IN THE

Supreme Court of the United States

October Term, 1966.

No. 37.

CURTIS PUBLISHING COMPANY,

Petitioner,

v.

WALLACE BUTTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONER

HERBERT WECHSLER,
435 West 116 Street,
New York, N. Y. 10027

PHILIP H. STRUBING,
123 South Broad Street,
Philadelphia, Penna. 19109

Attorneys for Petitioner
Curtis Publishing Co.

PEPPER, HAMILTON & SCHEETZ,
Philadelphia, Penna.,
KILPATRICK, CODY, ROGERS,
McCLATCHEY & REGENSTEIN,
Atlanta, Ga.,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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OPINIONS BELOW.

The opinions of the United States Court of Appeals for the Fifth Circuit (R. 1251-1305, 1380-1393) are reported in 351 F. 2d 702. The opinion of the United States District Court for the Northern District of Georgia on petitioner's motion for new trial (R. 70-80) is reported in 225 F. Supp. 916. The opinion of the United States District Court for the Northern District of Georgia, denying petitioner's motions for new trial under Fed. R. Civ. P. 60(b) (R. 1118-1125), is reported in 242 F. Supp. 390.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1965 (R. 1306). A petition for rehearing *en banc*, filed August 4, 1965 (R. 1307), was denied on October 1, 1965 (R. 1380). The petition for a writ of certiorari was filed December 11, 1965 and was granted October 10, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The District Court had jurisdiction by virtue of diversity of citizenship under 28 U. S. C. § 1352(a)(1).

QUESTIONS PRESENTED.

1. Whether the constitutional limitations on the standard of liability in libel actions, enunciated by the decision of this Court in *The New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), may be disregarded in reviewing a verdict and judgment rendered prior to the *New York Times* decision, on the ground that the constitutional question was not raised by the defendant at the antecedent trial.

2. Whether a publication charging, in substance, that the athletic director of a State University gave to the football coach of another State University confidential information calculated to affect the outcome of a forthcoming football game between the two schools is protected by the First Amendment, as interpreted by this Court in *New York Times* and subsequent decisions.

3. Whether an award of $400,000 as punitive damages for libel, after a jury verdict of $3,000,000 in punitive damages, constituted, in the circumstances, an abridgement of the freedom of the press or a taking of property without due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved are set forth in Appendix A, *infra*, pp. 79-83.

STATEMENT.

This is a libel action instituted by respondent against the petitioner on March 25, 1963 in the United States District Court for the Northern District of Georgia, demanding $5,000,000 in general damages and $5,000,000 punitive damages for the alleged defamation of respondent by an article published in *The Saturday Evening Post* of March 23, 1963 (R. 14-19).

1. The Publication.

The article (R. 1071-1074; Appendix B, *infra*, pp. 87-90), entitled "The Story of a College Football Fix" and sub-titled "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall," reported that on September 14, 1962, eight days before the opening game of the football season between the University of Georgia and the University of Alabama, George Burnett, an insurance salesman in Atlanta, while dialing the telephone number of a local public relations firm, was accidentally connected into a long distance telephone call from respondent at that local number to Paul Bryant in Tuscaloosa, Alabama. Respondent, the former head coach of the football team of the University of Georgia, was then athletic director of the University. Bryant was the athletic director and head coach of the football team of the University of Alabama.

The article told the story of the telephone call, as follows (R. 1072-1074; Appendix B, *infra* p. 88):

> . . . the voice of a telephone operator said:
>
> "Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"
>
> And then a man's voice: "I'll hold, operator."
>
> . . . .

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama.

Butts outlined Georgia's offensive plays for Byrant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?' And Butts said, 'Don't worry about quick kicks. They don't have anyone who can do it.'

"Butts also said that Rakestraw [Georgia quarterback Larry Rakestraw] tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself up to spin and hand off. And another thing he told Bryant was that Woodward [Brigham Woodward, a defensive back] committed himself fast on pass defense."

As the conversation ended, Byrant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said, "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad he kept on his desk. Some of the names were strange to him—tackle Ray Rissmiller's name he jotted down as "Ricemiller,"

and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett still sat at his desk, stunned, and a little bit frightened.

Suddenly he heard an operator's voice: "Have you completed your call, sir?"

Burnett started. "Yes, operator. By the way, can you give me the number I was connected with?"

The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified as that of the University of Alabama. The extension was that of the athletic department. Burnett then dialed Jackson 5-3536—the number he originally wanted. This time the call went through normally, and he reached a close friend and former business associate named Milton Flack.

"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

. . . .

That afternoon Burnett told Flack what he had overheard. Both of them, though only slightly acquainted with the high-spirited, gregarious Butts, liked him, and they decided to forget the whole thing. Burnett went home in the evening and stuffed his notes in a bureau drawer. He felt a great sense of relief. The matter, as far as he was concerned, was closed.

The article proceeded to describe the Alabama-Georgia game, which Alabama, a 14 to 17 point favorite in the "betting lines", won 35-0, stating *inter alia:*

Bryant, before the game, certainly did not talk to the press like a man who was playing with a stacked deck.

"The only chance we've got against Georgia is by scratching and battling for our life," he said, managing to keep a straight face. "Put that down so you can look at it next week and see how right it is."

The game itself would have been enjoyed most by a man who gets kicks from attending executions. Coach Bryant (he neglected to wear a black hood) snapped every trap. The first time Rakestraw passed, Alabama intercepted. Then Alabama quickly scored on a 52-yard pass play of its own. The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating.

. . . .

Georgia made only 37 yards rushing, completed only 7 of 19 passes for 79 yards, and made its deepest penetration (to Alabama's 41-yard line) on the next to the last play of the game. Georgia could do nothing right, and Alabama nothing wrong. The final score was . . . the most lopsided score between the two teams since 1923.

It was a bitter defeat for Georgia's promising young team. The 38-year-old Johnny Griffith, who was beginning his second season as head coach, was stunned. Asked about the game by reporter Jim Minter, he said: "I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football."

Quarterback Rakestraw came even closer to the truth. "They were just so quick and mobile," he told Minter. "They seemed to know every play we were going to run."

Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta *Journal*. "The Alabama players taunted us," end Mickey Babb told him. " 'You can't run *Eighty-eight Pop* [a key Georgia play] on us,' they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32-6.)

According to the article, the "whole matter weighed heavily on George Burnett" and he "began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut." On January 4, he told his friend Bob Edwards, whom he knew to be a friend of Johnny Griffith, his story of the phone call. Edwards asked if he could report the story to Griffith and Burnett told him to go ahead but try to keep his name out of it. Griffith pressed to meet Burnett and a meeting was arranged in the middle of January in Griffith's room at the Atlanta Biltmore Hotel, where Griffith was attending a meeting of the Southeastern Conference coaches.

. . . Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their linebackers are hollering out our plays while we're still calling the signals.'"

The article then reported that Griffith "went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain in his job"; that Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University, where he met Dr. Aderhold, the president of the University; that his story was carefully checked and he was asked to take a lie-detector test, which he passed; that an official of the Southern Bell Telephone Company checked and found that a call had been made from the Atlanta number to the University of Alabama extension noted by Burnett at the time when Burnett claimed he overheard the conversation; that on February 21, Burnett was summoned once again to Barwick's office, because "Bernie Moore, the commissioner of the Southeastern Conference, 'wanted to ask some questions' "; that at this meeting, attended by Moore, Dr. Aderhold, two members of the University's Board of Regents, and "another man identified as Bill Hartman, a friend of Wally Butts," Burnett "sensed a mood of hostility in the air" and was confronted with an accurate report that he had been arrested two years before for writing two bad checks—one for twenty-five and the other for twenty dollars—and that he was still on probation on that charge; that Burnett, who "felt that he had been candid with the University but that he had also angered many friends of Wally Butts," began to feel that he would be hurt "when and if these people decided to make this mess public"; that he then went to his lawyer and they agreed that he should tell his story to *The Saturday Evening Post.*

The article concluded, as follows:

> Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance.*"

When a fixer works against you, that's the way he likes it.

In an editorial accompanying the article (R. 1071), the *Post*'s editors asserted:

> *Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.*
>
> *Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.*
>
> *The corrupt here were not professional ball players gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.*

How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled.

The petitioner admitted publication of the article but denied that it was published "wilfully, maliciously and falsely," as averred by the respondent (R. 20, 16). It also pleaded truth as a defense (R. 20), a plea that the trial court ruled imposed on the defendant the burden of proving the "sting of the libel" by a preponderance of evidence (R. 34, 1019, 1021). The jury was instructed that the "sting of the libel" was "the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant information which was calculated to or could have affected the outcome of the game," in the sense that it "could have caused one team to win or lose, or could have increased the number of points by which the game was won" (R. 1021).

2. The Evidence.

At the trial, there was conflicting testimony as to whether Butts gave Bryant any information about Georgia's team, formations and plays and as to the value of the information that Burnett, according to his testimony, notes and prior statements, heard Butts give. Some of the incidental affirmations in the article were shown to be inaccurate. There also was dispute as to the adequacy of the *Post*'s investigation prior to its publication of the article and as to the publication policy followed by the *Post* under its recently changed command.

The evidence, in detail, was as follows:

The Butts-Bryant Conversation.

The defendant proved by records of the Southern Bell Telephone Company that a long distance call had been placed by Wallace Butts to Paul "Brince" at the Athletic Department of the University of Alabama in Tuscaloosa

at 10:29 a.m. on the morning of September 13, that the call lasted for 15 minutes, 2 seconds and that it was charged to the credit card of the University of Georgia Athletic Association (R. 119-121). It was also proved that a call billed to the credit card of Paul W. Bryant was placed from the University of Alabama to the home of Wallace Butts in Athens, Georgia at 8:51 p.m. on Sunday, September 16, 1962, and that it lasted for sixty-seven minutes (R. 122-124, 214).

Burnett's testimony substantially confirmed and elaborated his account of the Butts-Bryant phone call of September 13,[1] as it was reported in the *Post*.

Burnett said that after the parties had identified themselves (R. 129) and Bryant had asked "Do you have anything for me, Wally?" (R. 130), Butts answered "Yes" and began to give Bryant information about the offensive and defensive plays of the University of Georgia (R. 129-130, 150). Since the opening game with Alabama was to take place on September 22, Burnett inferred that the statements related to the plays that Georgia would be using in that game (R. 151). After the conversation had progressed for a minute or a minute and a half Burnett began to make notes (R. 130), writing as he could get the words (R. 131, 134), abbreviating when he could (R. 152, 164), missing things that were said (R. 132, 152, 164). The notes, spread over seven pages (R. 1077-1079), contained at the beginning the names "Bear Bryant" and "Wally Butts" (R. 1077) and at the end the words "Give Wally Ring Sunday," "641—Athletic Office," "10-40 A. M. —Sept. 13, 1962" and "Ja. 5-3536"[2] (R. 1079). Between

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1. The article inaccurately fixed the date of the call as September 14, but Burnett's testimony (R. 128, 155) and his notes (R. 1079) both fixed the date correctly as September 13.

2. Bryant testified that 641 was one of his extensions at the University of Alabama Athletic Department (R. 420-421). Ja. [Jackson] 5-3536 was the telephone number of Communications International, the number Burnett was attempting to reach (R. 128, 138).

these entries there were some twenty-one references to the capacity or the behavior of members of the Georgia team or to football formations or plays, representing Burnett's sometimes cryptic record of what he had heard Butts say. Having no independent memory of the details of many of these statements, Burnett used the notes to refresh his recollection (R. 130) and they also were admitted in evidence (R. 178).

According to Burnett's testimony and his notes, respondent told Bryant that Georgia lineman "Reismuller" (as his name was spelled in the notes, though it was actually Rissmiller [R. 130, 220; see also R. 234]) was one of the best in the history of the school (R. 130); that Mickey Babb (referred to in the notes as "Baer") an end who, according to Coach Griffith (R. 227) and Assistant Coach Pearce (R. 319), was Georgia's leading pass receiver, "catches everything they throw" (R. 136); and that halfback Don Porterfield was the best back at Georgia since Trippi (R. 134). Butts also said that Georgia safety-man Woodward (spelled "Woodard" in the notes) committed himself fast on pass defense (R. 132) (a tendency of his which Griffith and Pearce testified they had been attempting to correct [R. 222, 315]); and that Georgia's pass defense was weak and passes could be thrown in anybody's direction, except Blackburn, who was strong on pass defense (R. 133). Griffith testified that Georgia "had counted on" halfback Blackburn "being our best defensive back" but "he was sick off and on before the Alabama game, and didn't get the work he needed actually to be ready to play against Alabama" (R. 223).

Further, Burnett testified that Butts said that the formation Georgia played until they got close to the goal line was a slot to the right with the ends normal—split out about three yards (R. 135), and he also had noted "Slot right, left end out 15 yards" but remembered nothing more about that than the words that he wrote down (R. 136). The Georgia coaches testified, however, that these were the two

basic offensive formations that Georgia planned to use and used in the Alabama game (Griffith, R. 219, 227; Inman, R. 286-287; Pearce, R. 317-318). Butts also said that when Georgia was on the goal line " 'Baer' goes on a hook," a statement that was unintelligible to Burnett (R. 135) but was correct, according to Coach Griffith, assuming "Baer" to refer to Babb (R. 258). Butts also spoke of an "optional left pass"—if they can block the man on the corner, they keep running, if not, they pass (R. 131). This optional left pass terminology had been originated and used by Butts as head coach (Butts, R. 499; Griffith, R. 221), but was no longer used by Georgia in 1962 (Griffith, R. 221, 236; Pearce, R. 343). Butts also asked Bryant "You remember my old 29-0 series?" and said that Georgia used that (R. 136). Neither Griffith nor Pearce knew any Georgia play so designated (R. 226, 261, 350), but former backfield coach Hartman recognized the reference as an abbreviation of "29 overpass", a play that Butts had used during his tenure as head coach (R. 747, 751, 757-8).

Other notations, reflecting statements Burnett heard, included "On side guard pulls on sweep" (R. 1078, 132) and "Ga. Drop End off, contain with tackle (Defense)". (R. 1079, 137). Griffith (R. 222) and Pearce (R. 312-314) testified that on sweeps (end runs) Georgia pulled its on-side guard against certain defenses and Griffith confirmed that it was part of his defensive training for the Alabama game to "drop our ends off and contain with a six loose defense" (R. 227). Burnett did not remember what his notation "long count left half in motion" was in reference to (R. 134), but both Griffith (R. 223-224, 258) and Pearce (R. 316) discerned a meaning in relation to a Georgia play. Another notation "Right halfback on fly, Left halfback, quarterback gives to left half, left guard pulling blocks on corner" had a meaning to Burnett that he was not permitted to explain (R. 135), but meant no more to Griffith than that Georgia "put the right halfback on fly", which is a common practice (R. 258-259). The entry "Slot Rt—

Rt Half on Fly Screen to Him" (R. 1079) reflected a statement by Butts (R. 136), but was unintelligible to the coaches unless "him" referred to the left halfback rather than the right (R. 226, 260, 309-310, 325, 349-350).

A few of the entries in the notes meant nothing to Burnett or to the coaches.[3] Neither Griffith nor Pearce subscribed to an appraisal of the Georgia team as a "well disciplined ball club" (R. 256, 311-312) but Burnett testified that Butts had used those words and that he had also said, "This is no thanks to Johnny Griffith because they added two coaches" (R. 179, 131), as Georgia had, namely, Pearce and Inman (R. 230, 312).

It was also Burnett's testimony that during the conversation Bryant asked Butts questions about the Georgia team (R. 138, 148). One of these questions was "How about quick kicks?", to which Butts replied "Don't be worried about quick kicks; they haven't got anybody that can" (R. 135-136, 1079). According to Griffith (R. 225-226) and Pearce (R. 318-319, 352-354) the Georgia team had no one who could quick kick from its normal offensive formation, though a substitute quarterback could kick from a special formation. See also R. 745 (Hartman).

In response to several of Bryant's questions, Butts replied, according to Burnett, "I don't know." A "couple of times" Bryant then said "Can you find out?" and Butts answered "I will try." The conversation ended with Bryant asking "Will you be home Sunday, Wally?" Butts said "Yes" and Bryant said "I will give you a call then" (R. 148, 137).

On one point Burnett testified that the article was in error in its report of the conversation that he overheard. Butts did not say that Rakestraw "tipped off what he was going to do by the way he held his feet" or make any statement on that subject (R. 157, 158). Burnett did not tell

3. They were: "Rakestraw to right", as to which see R. 131, 254, 343; "Baer slot Rt/Split Rt End out," as to which see R. 133, 223, 345; "Don't over shift", as to which see R. 132, 180, 256, 340, 470.

the author of the article that such a statement had been made (R. 175), and according to Coach Griffith it was not correct (R. 266).

When the Butts-Bryant conversation ended, Burnett testified that he did not hang up immediately, that the operator spoke and he asked "to what number——." He was not permitted to complete his sentence or report his conversation with the operator, the Court ruling that it would be hearsay and sustaining an objection (R. 137, 146). After twenty or thirty seconds, Burnett dialed Jackson 5-3536, the number he had originally tried to reach, and spoke to Milton Flack at the office of Communications International. Again, he was prevented from testifying as to what he asked Flack or what Flack said, on the ground that it was hearsay (R. 138, 146).

According to Burnett, his office associate John Carmichael, whom he had been trying to locate when he dialed the Jackson number, came into the office thirty minutes to an hour and a half after he heard the conversation (R. 166). Burnett discussed the contents of his notes with him (R. 146). Later in the afternoon Flack came by and the three of them renewed the discussion (R. 146). Both Carmichael and Flack advised Burnett to "forget about the whole thing" and he tried to do so, putting the notes away in a dresser drawer at home (R. 146-147).

Carmichael, who testified for the respondent, confirmed and contradicted Burnett's story in some part. He stated that he came into the office about 10:30 on the morning of September 13 and found Burnett at Carmichael's desk with the telephone to his ear. When Burnett put his finger to his mouth, Carmichael walked outside the door to where there was a secretary's desk and began looking through the morning mail (R. 617-618). He was six or eight feet from where Burnett was seated (R. 619). After five or six minutes during which Burnett did not speak into the phone, Burnett called him into the office and said "John—I heard a conversation between Coach Wally Butts and Coach

'Bear' Bryant. Seems funny to me that one coach or athletic director would be calling another one before game time. I made some notes about it" (R. 620). He stated that if Burnett had said anything into the phone he would have heard it (R. 620) and specifically denied that Burnett spoke to the operator or to Milton Flack (R. 620-621).

Carmichael testified further that Burnett told him that in the telephone conversation Butts had said that some football player was a great football player and that Georgia had two new coaches and that Bryant had asked Butts if he was going to be home on Sunday. Beyond that, there was nothing involved in the Butts-Bryant conversation, as Burnett reported it to him, except general conversation (R. 622). According to Carmichael, Burnett related about the same thing to Milton Flack in his presence that afternoon (R. 623) and Flack reported that Butts had in fact been at the office of Communications International that morning (R. 624). In response to Burnett's question whether, in view of the conversation, they should bet on the Alabama game, both Carmichael and Flack said there was nothing there to indicate which side to bet on and that the best thing for Burnett to do was "to forget it" (R. 622, 624). Carmichael also swore that he had seen, though he had not handled, the notes that Burnett had on September 13 and they were not the notes in evidence at the trial (R. 644, 645-646, 789-791, 805-806).

Both Butts and Bryant testified, disclaiming any recollection of the telephone calls of September 13 and 16, but neither denied that the calls were made (Butts, R. 487, 590-591; Bryant, R. 393).

Butts acknowledged that he had talked to Bryant often through the years (R. 487), as he had talked with other coaches (R. 490-492). He specifically recalled calling Bryant in the summer of 1962 to inform him that the enforcement of certain rules would be improved (R. 485). But he denied that in the call of September 13 or at any other time he gave Bryant any secret information (R. 487,

490) or that he gave Bryant before the Alabama game any of the information embodied in the entries in Burnett's notes (R. 514) or that he ever gave any coach information about Georgia's plans in a forthcoming game (R. 516). He stated that he did not know Coach Griffith's game plan for the Alabama game (R. 514) and had never known his plan for any game (R. 490, 514). The first time he learned of the September 13 call was when John Carmichael, whom he had known for a number of years (R. 489), telephoned him in Philadelphia on January 30 to tell him of Burnett's disclosure to University officials (R. 487-488; see also Carmichael, R. 638-642).[4]

Bryant flatly denied that Butts in any conversation gave him information relating to Georgia's plays, formations or defenses (R. 393-395). He testified that Alabama was not properly prepared for one formation Georgia used in the game (R. 404-405) and that there was no significant change in Alabama's defensive plan between September 13 and the day of the game (R. 407). He attacked Burnett's statement that the operator on the September 13 call said "Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?" by stating that the practice field at Alabama is three blocks from the office having extension 641 and that morning practice had been discontinued by September 13 (R. 420-421). He pointed out that according to phone company records he had not only talked to Butts for sixty-seven minutes on September 16 but also to the University of Texas coach for thirty-seven minutes (R. 424). He said that during September 1962, he discussed a number of matters with Butts both personally and by telephone, such as schedules, whether to play the game in Tuscaloosa or in Birmingham, getting Georgia to buy some lights to make it

4. As permitted by Georgia law (R. 808-809), Dr. Aderhold testified as to Butts' general character, stating that it was bad (R. 825). Five other witnesses connected with the Unversity and members of the Georgia Athletic Board also so testified and said they would not believe him under oath (Bolton, R. 868; Heckman, R. 808-809; Bradshaw, R. 818-819; Driftmier, R. 821; Mills, R. 861).

possible to play at night, tickets, the band situation, the investment in which they both were interested, a new interpretation of the butting rules, football in general and particularly Butts' passing game (R. 424-427, 409).

Burnett's Disclosure and the Investigation by the University Authorities.

Burnett testified that he did nothing about the call that he had overheard until January 4, 1963, when, unable to restrain himself any longer, he told a close friend, Bob Edwards, about it (R. 139, 147). He was not permitted to testify to what he said to Edwards, on the ground that it was hearsay (R. 139).[5] He subsequently showed his notes to Edwards, who asked him to meet with Coach Griffith (R. 153), to whom Edwards had reported what Burnett had told him (R. 280, 779).[6] On January 24 (R. 190), Burnett, Edwards and Griffith met in Griffith's room at the Atlanta Biltmore Hotel, where Griffith was attending a meeting of the Southeastern Conference (R. 140, 153, 183, 217). Burnett turned the notes over to Griffith (R. 140). Though Griffith was not permitted to describe his reaction to the notes (R. 220), he did testify that he perceived in them references to the two formations Georgia planned to use and used in the Alabama game (R. 219); that in the 1962 season he thought "that somebody had given the Georgia plays or formations to other teams" (R. 274); and that he made the statement to Burnett "I figured somebody had been giving information to Alabama" (R. 268). According to Burnett, Griffith "made the remark that 'we knew something had happened,' that somebody had given away their plays; 'sold them out' is the words" (R. 159), and also said if this were allowed to continue in football he was going to get out of it (R. 159, 160).

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5. Respondent's witness, Carmichael, did testify, however, to what Burnett told him he had said to Edwards on this occasion. See R. 638.

6. Griffith's recollection differed on the date when Edwards first called him about Burnett's disclosure. He thought it was "before Christmas in 1962" (R. 280).

After examining the notes, Griffith telephoned J. D. Bolton, Comptroller of the University of Georgia and Treasurer of its Athletic Board, who was also registered at the hotel for the meeting at the Biltmore (R. 190, 217). Bolton went to Griffith's room and was shown Burnett's notes (R. 190). Upon his return to Athens on Saturday, January 26, Griffith turned the notes over to O. C. Aderhold, President of the University (R. 217, 191). That night they were delivered to Cook Barwick, a member of the Georgia Athletic Board, at his home in Atlanta (R. 191). Burnett did not have them again until the trial (R. 140, 186).

During the following week, Burnett and Edwards met with Dr. Aderhold, J. D. Bolton and Barwick in Barwick's office (R. 140, 187, 191). Burnett consented that the meeting be recorded (R. 187, 161). Ten days later, at a second meeting in Barwick's office, Burnett signed an affidavit (R. 141, 187) and agreed to take a lie-detector test, which he took in the first week in February (R. 142). On February 21, Burnett attended another session at which Bernie Moore, Commissioner of the Southeastern Conference, was present (R. 370, 373, 688, 845). On this occasion he was confronted with the fact that, contrary to his earlier statement that he had no record (R. 161), he was on probation on a bad check charge involving two checks, one for $20 and one for $25 (R. 692, 689). Sensing hostility in the meeting (R. 688-689), Burnett was frightened and disturbed (R. 162, 169). That afternoon he went to the office of his lawyer, Pierre Howard, and told him what had happened (R. 168). Burnett did not know that Howard had learned about the phone call previously from Carmichael (R. 170, 188), that he and Flack had actually been approached the day before by representatives of the *Post* interested in obtaining Burnett's story and that Howard had been trying to reach him by phone while he was in Barwick's office (R. 368-373). Howard told Burnett that the *Post* people were in town and, on his advice, Burnett decided "it was time for me to get this story out before people were trying to malign me totally in a different way" (R. 170). Howard

arranged an appointment that evening, Burnett told his story (R. 170, 374) and the next day in Howard's office Burnett dictated and signed an affidavit, which was given to Frank Graham of the *Post* (R. 375-376). Howard, acting for Burnett, agreed to Graham's proposal that the *Post* would pay Burnett $2,000 for the affidavit and, if the story were published and proved to be a *Post* exclusive, $3,000 after publication (R. 370-371, 376, 1051). These payments were made to Howard for Burnett (R. 1044, 1045), and Howard and Flack were each paid $500 by the *Post* (R. 1044, 1041). Burnett paid Howard $1,000 as a legal fee to represent him "in the things" he knew "were going to come from this" (R. 163).

On February 22, the day after Burnett's last meeting with the University authorities, Butts was asked to attend a meeting at Barwick's office (R. 192, 516, 829). On his arrival, he found not only Dr. Aderhold and Bolton, with whom he drove to Atlanta (R. 193), but also Harmon Caldwell, Chancellor of the University System; James Dunlap, chairman of the Board of Regents; Bernie Moore of the Southeastern Conference; and Bill Hartman, a close friend and former coaching assistant (R. 193, 829, 739-740). After brief prefatory remarks by Dr. Aderhold (R. 829), Barwick explained the nature of the Burnett story (R. 829, 740). Butts was handed a copy of the Burnett notes (R. 830, 740). After looking at the notes, he said, according to Bolton (R. 193-194):

> ". . . No doubt the guy heard what he said he heard. I don't blame him for placing the interpretation that he did on this conversation. If I had been in his place, I probably would have thought the same thing, but he is mistaken. It's just conversation, ordinary football talk among coaches, and that (sic) you know I would never give old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia. If I did give any information to hurt Georgia it was not intentional."

Dr. Aderhold testified that Butts "indicated that the call was made, and that these items were probably discussed, but they did not mean what Mr. Burnett had indicated that they did mean" (R. 831). Butts testified that, on being shown the notes, "I said such a telephone call might have been overheard. . . . I did not evaluate the notes" (R. 517). Hartman testified that what Butts said was "it was possible that a telephone conversation could have been overheard . . . but that it had been misconstrued" (R. 741).

According to Dr. Aderhold and Bolton, Butts was asked to sign an affidavit and to take a polygraph test, as Burnett had done, and he refused (R. 831, 197-198). Both Butts and Hartman denied that he had been asked to sign an affidavit (R. 517, 744). Butts testified that he refused to take a lie-detector test because he considered it "more or less, an insult" (R. 600).

Butts had previously been the target of unfavorable criticism by alumni of the University (R. 583, 812-813, 832, 839) and, on January 28, had asked to be retired as athletic director on the following June 30 (R. 585, 833-834, 840). On February 23, the day following the meeting, he resigned effective February 28, his letter to Dr. Aderhold stating that during the past two years he had "developed business interests" to which he was "having to devote more time" (R. 585, 1083). Butts' explanation of the resignation was that he had heard the night before that a newspaper story was about to be published stating that he would resign the following week instead of in June, that Bolton had told him that this would "be embarrassing to the President" and that to avoid that embarrassment he resigned (R. 584). Aderhold testified, however, that though Butts had mentioned the prospective publication and asserted that he had not authorized it, he had not given "those reasons" when he resigned (R. 847).

On February 24, Aderhold and Barwick met with Dr. Frank Rose, President of the University of Alabama, at

Bernie Moore's office in Birmingham (R. 848-849, 918-919). They told Rose "that there had been a telephone conversation or telephone conversations between Coach Bryant and Coach Butts regarding the coming football game" (R. 919). Rose, "greatly disturbed" (R. 919), undertook his own investigation, beginning by interrogating Bryant for about three hours that evening (R. 919). He talked to Bryant twice again (R. 921) and on March 6, he wrote to Dr. Aderhold, as follows (R. 1084-1085):

> I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.
>
> Coach Butts has been serving on the football rules committee, and at a meeting held last summer [of], the Rules Committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changes [sic], particularly on certain plays.
>
> Coach Butts had discussed this with Coach Bryant and the two were together at some meeting were Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team.
>
> Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

At the trial, Dr. Rose conceded that Bryant's invitation to Gardner and Gardner's visit to the University of Alabama to discuss the new rules interpretations had occurred "before the telephone conversations that Coach Bryant had had" (R. 926, 938), i.e., before September 13. Though he had stated in his pre-trial deposition that the information in his letter had been "obtained from Coach Bryant" (R. 944), his testimony at the trial was that the letter contained only his "interpretation" of what Bryant said "he could have talked about" with Butts (R. 925, 931, 944); that when he used the words "plays" and "defenses" in the letter, he should have said offensive or defensive "techniques" (R. 925, 933, 938); that Bryant, when he talked to him, "did not recall specific telephone calls at first" but said that "he had had many telephone conver-

sations with all the coaches and athletic directors with whom we play", that "this was nothing unusual, that coaches talk about many things before a ball game" (R. 920); and that Bryant had told him he did not remember calling Butts back on September 16 (R. 936-937). Rose also testified that he had dictated the letter of March 6 hurriedly before taking a plane to Washington and did not have a chance to read it before it was signed and mailed by his secretary, who was supposed to clear it with Bryant but had been unable to do so (R. 922).[7]

The Significance of the Information Reflected in Burnett's Notes and the Alabama-Georgia Game.

The Alabama-Georgia game opened the 1962 football season and Georgia had an abnormal number of sophomores on its team (R. 230, 218). These facts, in the opinion of Coaches Griffith and Pearce, limited the information Alabama could have had through scouting and exchange of films about Georgia's plans (R. 232, 306-307). Practice, which began September 1, was conducted behind a walled practice field from which the public was excluded (R. 296-297, 303). Butts as athletic director had access to the practice sessions, and prior to the Alabama game had attended some, including the session on September 15 (R. 297, 326, 472). To protect the secrecy of its plays, the Georgia team was divided into three groups, the ends, the backs and the linemen, and only that portion of each play which pertained to their respective positions was distributed to each group, except for the quarterbacks who had a complete picture (R. 303-304).

In the opinion of Coach Griffith, the Burnett notes contained meaningful information for an opposing coach

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7. Evidence refuting this testimony, including a letter from Bryant to Dr. Rose, dated February 28 (R. 1111), was not discovered by petitioner until after the trial. It was one of the grounds of petitioner's motion for new trial under Fed. R. Civ. P. 60(b) (R. 1090-1106). See R. 1119-1121.

about the Georgia team which might affect the result of the game, of which the most important was the description of the two principal formations Georgia planned to use (R. 227, 281). The notes did not "disclose just general football talk" (R. 231). On cross-examination, Griffith stated that a good number of the notations were inaccurate and that the only things of value were the references to the two formations (R. 281-282). That knowledge, he thought, would free practice time which otherwise would have to be devoted to preparation against other formations Georgia possibly might use (R. 228).

Assistant Coaches Inman and Pearce were also of opinion that the information in the notes could have been helpful to Alabama. Inman thought that "any information in football from a reliable source would be valuable to any coach" (R. 288). Pearce, in addition to referring to the two formations (R. 305-306), thought that it would be helpful to know who the best opposing lineman was (R. 311), that the on side guard might pull on a sweep (R. 312-313), that the pass defense was generally weak (R. 316), that the size of the slot right was three yards (R. 317), that Georgia could not quick kick from normal formation (R. 318-319) and that Woodward committed fast (R. 330).

Assistant Coach Gregory, testifying for respondent, viewed most of the entries in Burnett's notes as an inaccurate description of Georgia's formations and plays or as inconsequential (R. 468-476). He had, however, signed a letter to the Assistant Attorney General of Georgia stating that "if such information was given to Coach Bryant before the opening game of the season, it conveyed vital information with respect to the offensive and defensive plays, patterns and formations that could have been of value to the University of Alabama football team . . ." (R. 477). He testified that this was a statement that Griffith told him the Attorney General had sent over; that it was typed in Dr. Aderhold's office; and that he had signed it because he was afraid that his job would otherwise be jeopardized (R. 478, 480).

Charles Trippi, Georgia offensive backfield coach in 1962 (R. 545), testified that if the notes "had to do with a team" he "was preparing to play", the "first thing" he "would do is tear them up because they are baseless; there is nothing in here that indicates any tendencies" (R. 546), "nothing in here to substantiate anything of value in football planning" (R. 550). He also expressed the opinion, based upon his "experience as a college football coach and a professional football coach," that "the outcome of a college football game" cannot "be pre-arranged, fixed, or rigged without the participation of the players, or some of the players, themselves" (R. 549-550).

William C. Hartman, Jr., a former Georgia assistant coach (R. 738), testified that he did not think that the Burnett material "would be of any significance at all" to him if he were coaching Alabama "because most of the technical information in these notes are basic T-formation plays" and the University of Alabama "or anybody else, anybody in the United States, somewhere in their offense has all of these plays" (R. 746). He would rely on his "own scouting information" he had "gotten through statistical study" (R. 747). He also thought that Alabama "must have seen at least three or four movies" showing that Georgia used a slot-right in 1961 and, if they did so, would have had to use it in the opening game of 1962 (R. 746).

In Bryant's testimony, he denied that any of the information reflected in Burnett's notes would have been helpful to him, though he said that there may have been a couple of things that he would rather have known than not known (R. 427-428). He insisted that what would be of interest to him about another team would be its game plan, what they planned to do in specific circumstances, such as certain field positions or on particular downs (R. 428-430).

LeRoy Jordan, who was captain of the Alabama team in 1962 and had become a professional player (R. 534) did

not think it would mean anything to a defending coach to know the offensive formations of an opponent; what he would want to know is when he is going to run a particular play (R. 538-539). Charles Pell, who also played for Alabama in 1962 (R. 445), expressed the same opinion (R. 446-454). Both Jordan and Pell thought that a football game could not be rigged without the knowledge and participation of the players (R. 541, 454).

Though Alabama entered the Georgia game a 14 to 17 point favorite (R. 304), the score was 35-0 and Georgia never got closer than the 40-yard line to the Alabama goal (R. 278), gaining less than a hundred yards in its offensive plays (R. 277). There was no evidence, however, that related Alabama's strategy or performance in the game to specific information in the Burnett notes and there was some to the effect that Alabama did not take advantage in its play of points that the notes revealed (Pearce, R. 330-333, 345; Butts, 509). Bryant testified, as previously noted (p. 17, *supra*), that Alabama was unprepared for one formation Georgia used. Jordan (R. 537) and another Alabama player, Jimmy Sharp (R. 438-439), gave the same testimony. Bryant, Jordan and Sharp also testified that Alabama made no significant change in its defensive plans between September 13 and the day of the game (R. 407, 541, 441). Trippi, Georgia's assistant coach in charge of offense, who called eighty (R. 264) to ninety per cent of the plays used by Georgia (R. 545), said he saw nothing to indicate that Alabama knew anything about what Georgia was going to do in the game; the only thing he saw was that Alabama blocked, tackled and ran harder than Georgia (R. 549).

Coach Griffith, who was "stunned . . . to a certain extent" by the score (R. 274), testified that during the game one or two players came off the field "with a statement along these lines, that 'they know what we are running; they are even calling out our plays. What are we going to do?' or something along those lines" (R. 274, 270).

Griffith denied that his players had taken "a frightful physical beating," as stated in the article (R. 273) and Georgia players Robert Wallace Williamson, Mickey Babb and Brigham Everett Woodward also testified that this was not the case (R. 557, 563, 575). Williamson also testified that there was nothing said or done by the Alabama players which indicated that they knew what Georgia was going to do (R. 556). Babb said that as a player in the game he did not feel that their moves were being analyzed by the Alabama team (R. 564) and he specifically asserted that he was inaccurately quoted in the article as having told Furman Bisher that the Alabama players "knew just what we were going to run and just what we called it" and taunted them by yelling out "you can't run eighty-eight pop on us," (R. 564); any statements that he made to Bisher had referred to the 1961 game (R. 568). Sharp also testified that he had not heard any Alabama player calling out "you can't run eighty-eight pop on us" (R. 442); and there was proof that Georgia had no play designated by those words (R. 279).

The Circumstances of the Publication.

News of the Butts-Bryant affair reached Roger Kahn, sports editor of the *Post,* in New York on Tuesday, February 19, 1963 (R. 719-720). The information came from an attorney in Birmingham, Alabama, Roderick Beddow, who was representing petitioner in a libel suit brought there by Bryant against petitioner and Furman Bisher, based on an article by Bisher in the *Post* (R. 367). Kahn selected Frank Graham, an experienced sports writer (R. 361-362), to go to Atlanta to investigate the matter (R. 721, 366). If, in Graham's judgment, there was a story there, he was to proceed (R. 721). The *Post* was interested in getting to the truth of the entire matter (R. 726). Graham was to move with all deliberate speed (R. 725) to do a complete investigation, without any time limitation (R. 725). He was to go to Atlanta to get all the available facts (R.

722), an affidavit from Burnett (R. 723) and, if possible, a copy of his notes (R. 723). Kahn cautioned Graham to be careful, that this was a big story (R. 725).

Graham arrived in Atlanta late on the night of Wednesday, February 20 (R. 368). On the following morning, he met Beddow and they went to the office of Pierre Howard (R. 368-369). Shortly after their arrival there, the group was joined by Milton Flack. Howard and Flack recounted the story told by Burnett (R. 369). They also filled Graham in on the background of the Georgia football situation as they knew it (R. 369). Howard told Graham that Butts had resigned as head coach of the University of Georgia in 1961, after prominent alumni had soured on him (R. 662), and that, since that time, Butts had been outspokenly bitter about his replacement (R. 663). Graham was also told by Flack and Howard that Butts had lost approximately $80,000 in a Florida orange grove speculation (R. 663-664). He was also told that it was rumored that Butts had entered a hospital in Athens (R. 686) but Bisher later informed him that the rumor was unfounded (R. 686).

At 7:00 p.m. on the evening of February 21, Burnett, Howard and Flack met Graham at his room in The Heart of Atlanta Motel and Burnett told his story (R. 170, 374). After relating what had transpired at the meeting with the University officials earlier that day (R. 374), Burnett told Graham of the call he had overheard, as it was subsequently reported by Graham in the article (R. 386-391), except for the statement that Rakestraw tipped off what he was going to do by the way he held his feet, which Graham had heard from Howard and Flack, who thought that they had heard it from Burnett (R. 657-658, 175).[8]

On the following morning, Graham again met Burnett at Howard's office and asked Howard for a copy of Burnett's notes (R. 378-379). Howard promised to obtain a

8. Graham did not learn of his error on this point until after publication of the article, when Burnett advised a representative of the *Post* that he did not recall overhearing such a statement (R. 657-658).

copy for him from Cook Barwick and rush it to Graham by air, but this was never done (R. 378). Burnett did, however, repeat his story in an affidavit that was delivered to Graham, in accordance with the agreement with Howard (see p. 20, *supra*).

Graham spent that morning at the Atlanta Public Library, studying the newspaper reports of events leading up to and following the Georgia-Alabama game (R. 379-381). Burnett and Flack drove him to the airport, spending about three and a half hours with him there (R. 381, 172). Before leaving Atlanta, Graham read in *The Atlanta Journal* that Butts was to resign at once as athletic director (R. 662).

On Monday, February 25, Furman Bisher called Roger Kahn in New York, telling him that he had a major story involving colossi of southern football (R. 732-733). Kahn called Graham and arranged a meeting with Bisher at his hotel later that evening (R. 363, 733). Bisher told Graham substantially what Graham had already learned in Atlanta, much of which was contained in Burnett's affidavit for the *Post* (R. 364-366)—information that Bisher had apparently obtained from Cook Barwick (R. 364).

Kahn knew Bisher to be a good reporter (R. 732). Since he had more entrees to people in Atlanta, it was decided that Bisher would complete the investigation there (R. 365). He was to accumulate every bit of useful information, particularly through talking to the University authorities (R. 691), and forward it to Graham. Kahn suggested that films of the game should be reviewed but believed that Bisher said they were unavailable (R. 736). Bisher testified that he had no recollection of a discussion at that meeting about viewing the films but that there might have been and he would have said it would have been a very good idea (R. 779).

On March 1, the Friday after his meeting in New York, Bisher telephoned Graham from Atlanta, stating that he had talked to people at the University. He gave Graham

the quotations of Mickey Babb (R. 674-675) and the trainer, Sam Richwine (R. 676), that Graham used in the article—statements that Babb and Richwine denied at the trial that they had made (R. 564, 570). Bisher was also the source of some of the quotations of Coach Griffith in the article (R. 682-684), including the statement "I never had a chance" (R. 737) that Griffith testified at the trial he never said (R. 270-271). Bisher also confirmed to Graham Burnett's statement that the Southern Bell Telephone Company had checked and that its records showed that a call had been made by Butts to Bryant on September 13 (R. 687-688).

Graham wrote the article, relying for his sources on Burnett's affidavit and oral statements in Atlanta (R. 386-391, 661, 678-681, 685, 688-689, 692), what he was told by Flack and Howard (R. 657, 661, 662, 664, 673, 685), his study of the newspaper stories relating to the Alabama-Georgia game (R. 380, 668, 671, 672, 676) and the information furnished him by Furman Bisher (R. 383, 661, 662, 674-676, 682-684, 688, 698). On Monday, March 4, he sent a copy of his draft to Bisher in Atlanta and Bisher offered no suggestions or corrections (R. 384). The *Post* paid Bisher $1,000 for his work (R. 1043).

The decision to publish the Graham article was made by Davis Thomas, managing editor of the *Post*, and approved, after a reading of the copy, by Clay Blair, Jr., then editor-in-chief of Curtis Publishing Company (R. 706). Portions of their testimony, taken by deposition by respondent, were introduced in evidence (R. 703-718; 769-778). Both of them knew that Butts' career might be ruined by the story (R. 715, 770). Thomas stated that he made certain that "every significant source" was "thoroughly investigated" and that "the most particularityness of care" was exercised (R. 770-771). Blair was concerned that the matter "be checked out thoroughly" as "to the truth of the article" (R. 716). Thomas expected his writer to "get the real facts" (R. 772) and said that it was not the

practice of the *Post* to submit an article to persons mentioned in it, but rather to "rely" on its "reporters" (R. 774-775). He believed that Burnett was telling the truth, attaching "a great deal of significance to the affidavit" and taking "into consideration" the fact that he had been arrested and convicted of passing the bad checks (R. 771-772). Though the *Post* "would have liked to see" the Burnett notes, it published without seeing them, since they "knew the notes existed" (R. 773). The quotations of Griffith in the article were believed to be accurate at the time when they were published (R. 775). If Griffith had wanted to write a letter to the *Post* correcting the quotations, "We would have been happy to publish it in the 'Letters' column of the magazine" (R. 775). Graham had not thought it necessary to interview Carmichael because he had been told he would not talk to him (R. 666-667). Thomas was aware of this (R. 699-700, 771) and apparently supported Graham's decision (R. 774).

Blair wanted to change the "image" of the *Post* (R. 711) and in an interview with *Newsweek* in November 1962, he had said that he intended to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" (R. 714). He testified, however, that he did not use the term "muckraking" in the sense in which the dictionary describes its use by President Theodore Roosevelt—to refer to unjust and sweeping charges—but rather in the sense of expose; and that by "sophisticated" he did not mean sophistical (R. 712-714). Blair also had circulated a congratulatory memorandum to his staff on January 15, 1963 (R. 1040), in which he stated, facetiously according to his testimony (R. 710), that the "final yardstick" of the improvement in the magazine was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." By "them" he meant "the whole United States" (R. 709). He was inaccurate, however, about the number of lawsuits; there were less (R. 710). Blair also

testified that in his opinion the issue containing the Butts' article was "a step in the right direction", saying that "with this issue . . . we have gone 25 per cent toward the goal of the magazine that I envision" (R. 711).

Blair also acknowledged that the Curtis Publishing Company showed a loss of about $1.1 million for the first quarter of 1963, compared to $4.7 million for the same quarter of 1962; that from 1960 to 1961 advertising revenue had declined $20 million and about the same amount from 1961 to 1962; that advertising revenue is affected by the size and nature of circulation; and that he "would be hopeful we could have more advertising revenue in the Post" (R. 707-708).

Under date of March 11, 1963, seven days before the publication date of the article, respondent's counsel sent a telegram and registered letter to the *Post*, stating without specification that the charges contained in the proposed article were false (R. 777). Sometime during the week prior to publication, respondent's daughter telephoned Blair and tearfully asked him not to publish (R. 717-718). Following the publication of the article, a demand for a retraction was made by the respondent and ignored by the *Post* (R. 17, 20).

3. The Rulings and Judgment of the District Court.

The District Court held that petitioner's evidence in support of its plea of truth sufficed to present a question for the jury, declining to direct a verdict for the plaintiff on that issue (R. 354-359). It charged the jury, as stated above (*supra*, p. 10), that the defendant had the burden of proving the truth of the "sting of the libel" by a preponderance of evidence (R. 1019, 1021); that unless the defendants proved the statements to be true, they were libelous per se (R. 1020, 1022, 1023); that malice was "to be inferred" (R. 1023); and that "the law will presume that anyone so libeled must have suffered damage" (R. 1023). The jury also was instructed that where "it is established

that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages" (R. 1026); that "the burden of proof to establish the facts of actual malice is upon the plaintiff . . . by a fair preponderance of the evidence" (R. 1026); and that "actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" (R. 1026). The "purpose of punitive damages," the jury was told, "is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense." Such an award "is intended to protect the community and has an expression of ethical indignation . . ." (R. 1026) and the sum awarded as punitive damages "need have no relationship to any amount" that the jury might "award for general damages" (R. 1025).

On August 20, 1963, the jury returned a verdict in favor of respondent, awarding him $60,000 general damages and $3,000,00 punitive damages (R. 1036). Petitioner filed a timely motion for new trial (R. 36-66), contending *inter alia* that the verdict for punitive damages was invalid under the First, Fifth and Fourteenth Amendments to the Constitution (R. 36-38). On January 14, 1964, the District Court denied petitioner's constitutional claims, viewing them as an attack on the Georgia statute allowing punitive damages and holding that such a contention "is an affirmative defense and must be so pleaded in defendant's answer" (R. 76; 225 F. Supp. at 920). However, the court found the amount of the punitive damages awarded by the jury to be "grossly excessive," expressed the "considered opinion" that the "maximum . . . that should have been awarded" is $400,000 (R. 76) and granted petitioner's motion for new trial unless respondent within 20 days should remit the punitive damages in excess of $400,000 (R. 81; 225 F. Supp. at 922). Respondent filed the remittitur (R. 82) and on

January 22, 1964, the District Court entered judgment against petitioner for $460,000 (R. 83). Petitioner filed a notice of appeal to the Court of Appeals for the Fifth Circuit on January 24, 1964 (R. 84).

On February 28, 1964, petitioner moved again for a new trial under Rule 60(b)(2) of the Federal Rules of Civil Procedure on the ground of newly discovered evidence (R. 1090-1112). While this motion was pending, this Court, on March 9, 1964, decided *New York Times Co. v. Sullivan*, 376 U. S. 254. Thereafter, on March 23, 1964, petitioner filed an additional motion for new trial under Rule 60(b) (R. 1115-1118), contending that the respondent as director of athletics of the University of Georgia was a public official within the meaning of the *New York Times* decision and thus precluded from recovering for a statement relating to his official conduct without proof that the statement was published with knowledge that it was false or with reckless disregard of whether it was false or not; that the definition of "actual malice" given the jury by the District Court did not conform to this requirement; and that the evidence at the trial did not suffice to prove malice in this sense with the "convincing clarity" required by the *Times* decision.

Though the issue had not been litigated as such at the trial, the record showed or it was subject to judicial notice that the University of Georgia is a state institution operated by the Board of Regents of the University System (GA. CODE ANN. § 32-101 *et seq.*); that Butts was employed as the director of athletics of the University by the separately incorporated Athletic Association, a fifteen member Board of which the president of the University was chairman *ex officio* (R. 807, 823, 832, 189, 874-875), composed of a majority of faculty members appointed by the president and a minority selected from alumni (R. 874-875, 769, 189); that the Association is an agent of and employed by the Board of Regents to supervise the University athletic program (R. 189; see *Allen v. Regents*, 304 U. S. 439, 443,

452 [1938]); that Butts received a salary of $12,000 from the Association (R. 875, 877), with some addition paid by the University subject to teacher retirement [9] (R. 846); and that his duties were to supervise the entire athletic program of the University, including the scheduling and location of intercollegiate games in all sports, planning and budgeting, the adding of new athletic facilities and ticket sales (R. 492-493, 425). According to the opinion of the District Court, by virtue of his position the respondent also was a member of the faculty (R. 1124).

The District Court denied the motions for new trial on April 7, 1964 (R. 1118-1125), ruling both that the respondent was not a public official within the principle of the *New York Times* decision and that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not" (R. 1124-1125; 242 F. Supp. at 395). Petitioner filed a notice of appeal from this decision on April 10, 1964 (R. 1125).

4. The Decision of the Court of Appeals.

On appeal from the judgment and the order denying the motion for new trial under Rule 60(b), petitioner urged the constitutional contentions rejected by the District Court on the motions for new trial and argued, in addition, that the judgment entered on the remittitur was repugnant to the Constitution.

The Court of Appeals affirmed the judgment by divided vote (R. 1251-1306). The majority (Judge Spears, with

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9. The additional amount involved is not established by the record. A question by respondent's counsel sought, however, to bring out that he received $6500 a year from the Georgia Student Educational Fund (R. 877). The State Department of Audits Report of Examination of the University of Georgia for the year ended June 30, 1963, a document that Georgia law requires to be filed for public information (GA. CODE § 40-1805(c)), shows (p. 211) payments by the University to respondent as athletic director of $1,666.64 for the eight months before his resignation.

the concurrence of Judge Brown) declined to rule upon petitioner's contentions based upon the *New York Times* decision on the ground that petitioner's failure to raise at the trial the constitutional questions that some of its attorneys knew were being litigated in the *Times* case "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*" (R. 1265-1266; 351 F. 2d at 713). Ignoring the constitutional attack on the verdict, the Court also held that there was "ample basis for the trial court's judgment" in selecting "the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts" (R. 1278; 351 F. 2d at 719); and that the requirement of the remittitur of the punitive damages held to be excessive was "a permissible course" that "does not infringe upon the Seventh Amendment's guaranty of a jury trial" (R. 1277-1278; 351 F. 2d at 718-719).

Judge Rives dissented on all points. In his view the respondent was a public official and the publication related to his official conduct, within the principle of *New York Times* (R. 1281-1286; 351 F. 2d at 720-723); the trial court's instruction did not comply with the *New York Times* standard since it permitted "recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood" (R. 1286-1287; 351 F. 2d at 723); it was the duty of the District Court to give effect to the supervening decision of this Court by granting the motion for new trial (R. 1291; 351 F. 2d at 725) and the defendant may not be "said to have waived by 'silence' a constitutional right not enunciated at the time" (R. 1287; 351 F. 2d at 724).

Apart from the constitutional deficiency of the criterion of malice embodied in the District Court's instruction to the jury, Judge Rives also concluded that the $400,000 punitive award was a deprivation of property without due process and a prior restraint forbidden by the First Amendment;

and that the jury verdict of $3,000,000 so reflected passion and prejudice that it could not be cured by the remittitur consistently with the Seventh Amendment. These grounds, Judge Rives thought, were all properly presented in petitioner's attack upon the verdict and upon the District Court's denial of the motions for new trial (R. 1291-1298; 351 F. 2d at 726-729).

A petition for rehearing before the Court of Appeals *en banc*, filed under Fifth Circuit Rule 25(a), was denied by the same panel of the Court by the same divided vote, the majority and the minority reiterating their positions in further opinions (R. 1380-1393; 351 F. 2d at 733-739).

SUMMARY OF ARGUMENT.

I.

The Court of Appeals was plainly wrong in holding that by failing to invoke the First Amendment at the trial petitioner had waived the right to challenge the standard of liability, applied by the District Court, under the supervening ruling of this Court in *New York Times Co. v. Sullivan.*

Ever since the early days of the Republic this Court has affirmed the duty of the courts of the United States to decide cases in accordance with the law prevailing at the time when they are called upon to render judgment, including, in the case of an appellate court, the time of the appellate judgment. That the rule governs when the change of law derives from a revised interpretation of the Constitution by this Court, except in the rare case where the revision is expressly given a more limited prospective operation, is not an open question, so long as the case is on direct review.

The judicial duty defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefit at stages of the litigation prior to the time when it occurred. It is, moreover, immaterial in this connection that the decision of the court below was cast in terms of finding "waiver" by petitioner. If there was no duty to anticipate the ruling of this Court in *New York Times* there was no basis for finding a waiver in the failure to advance before the *Times* decision the constitutional grounds that were asserted in that pending case. A right is not "known" to exist if it is merely known to be asserted in another litigation.

Even if the absence of an anticipatory objection at the trial engendered a discretion to apply or disregard the supervening judgments of this Court, such discretion was abused by the decision to ignore the constitutional sub-

mission. For here the issue was presented in the District Court at the first reasonable opportunity following this Court's decision; the District Court decided it upon the merits, its ruling making clear that any earlier submission would have had no influence on the result; and only the unfounded ground of waiver was adduced to justify withholding an adjudication.

II.

The publication was protected by the First Amendment and entitled to the privilege established by the rule of *New York Times*.

A. Under the criteria laid down by this Court in *Rosenblatt v. Baer*, the plaintiff was a "public official" and the publication was concerned with his misconduct in performance of his duties.

Rosenblatt did not definitely hold that if the publication implying dishonesty in the financial management of the Belknap County Recreation Area could be found to make a reference to Baer, the constitutional privilege must necessarily apply. The disposition is, however, instinct with the affirmation that if Baer was, indeed, responsible for the financial management of the Area, the privilege would attach to statements that impugned his honesty or his efficiency in the performance of that task. No other conclusion is consistent with the general criteria embodied in the Court's opinion. It was not doubted that the operation of the publicly-owned Area involved the "conduct of governmental affairs" and could not have been doubted that if Baer's position involved "substantial responsibility" for its management, the public had "an independent interest" in his "qualifications and performance . . . beyond the general public interest in the qualifications and performance of all government employees."

If actual or apparent responsibility for the management of a public recreation area suffices to accord the privilege to charges of malfeasance in performance of that func-

tion, there can be no basis for a contrary result when the responsibility to which the charge relates entails the management of the program of athletics of a University established, maintained, and supported by the State. In the one case no less than in the other, the privilege is necessarily to protect the freedom of the press to criticize the way in which an important public trust has been discharged, a freedom that the First Amendment surely was designed to make secure.

It is immaterial in this connection that the respondent was not employed as Athletic Director by the Board of Regents of the University System but rather by the Athletic Association of the University, a separate corporate entity composed of a Board of faculty members and alumni, which a statute declares "not to be" an agency of the State and the accounts of which are exempted from State audit. These statutory provisions have no greater import than the State definitions of the term "public official" that were held to be irrelevant in *Rosenblatt*. What is decisive is that the Athletic Association is an organ of the management and government of the University. Its status as a separate corporation is wholly unrelated to the purpose of the First Amendment and the privilege defined by *New York Times*.

B. The public interest in the quality and the integrity of the respondent's conduct as Director of Athletics does not derive only from the fact that Georgia is a State University, decisive as that fact is to accord the privilege of *New York Times* to statements critical of his discharge of his official duties. The integrity of college football is a matter about which the public has important and legitimate concern, whoever the participants, because it is a phase of higher education. This public interest in the subject matter of the publication suffices, we contend, to gain it the protection of the First Amendment and the privilege prescribed by *New York Times*.

The qualified privilege of *New York Times* embodies an accommodation of the conflicting interests in protecting reputation and protecting freedom of expression. Its principle is similar to that which elsewhere has been deemed to be essential to sustain a curb on speech or publication, assimilating the criteria of libel law in this respect to those demanded by the Constitution in related fields. We see no reason why this same accommodation should not govern liability for statements that reflect on non-official persons, if the same conflicting interests are involved.

In a society in which the relationship between government and private enterprise assumes as many diverse forms as in our own, including the magnitude of private power and the extent of public subsidy, the freedom that the Constitution deems most vital for correction of abuses ought not to be circumscribed by artificial lines.

III.

The respondent's argument that "actual malice within *New York Times* was conclusively proven" is both legally immaterial and wholly unsupported by the record.

The argument is legally immaterial because the District Court's instructions to the jury did not call on it to make a finding that comports with the requirements of *Times*. The charge, precisely like those held erroneous in *Times* and later decisions, allowed "recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood" or, even short of this, a merely "negligent misstatement". The grounds for reversal in the previous decisions are accordingly presented here.

Nor is there support for the contention that knowledge of falsity or reckless disregard was "conclusively proven" at the trial. Such an assertion is entirely inconsistent with the trial court's ruling that there was a jury question on defendant's plea of truth despite the burden of persuasion placed on the defendant and its statement in the charge that there "has been a sharp conflict in the testimony in this case." The defendant's evidence of truth was, apart

from small detail, included in the evidence that led the publisher to think the story true when it was published.

If this Court should undertake to make its own appraisal of the record, we contend that far from the conclusive proof to which respondent has referred, it lacks entirely "the convincing clarity which the constitutional standard demands." We think the evidence makes clear that this was an entirely honest publication, reflecting the conviction of the agents of the *Post* that Burnett was a credible informant, whose story was sufficiently confirmed to be believed.

IV.

Whether or not the rule of liability applied in the District Court is consistent with the First Amendment, the verdict and the judgment are repugnant to the Constitution.

The jury verdict of $3,000,000 punitive damages for a publication causing "actual damages", including mental anguish and humiliation, assessed at $60,000, was not only "grossly excessive", as the District Court found; it contravened the First Amendment and entailed a deprivation of due process.

Even though a measure burdening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser v. Randall*, 357 U. S. 513, 520 [1958]) and "viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U. S. 479, 488 (1960). Apart from the protection of the First Amendment, this Court has held that a penalty or money judgment deprives of property without due process if it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." *Life & Casualty Co. v. McCray*, 291 U. S. 566, 571 (1934). It takes no argument to show that the $3,000,000 verdict "unduly" infringed the "protected freedom" and inflicted "sheer oppression". The verdict supplies what Mr. Justice Black concurring in *New York Times* called

"dramatic proof" . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs . . ." (376 U. S. at 294). The only way that threat can be removed is to hold that a punitive award must be shaped by such objective factors as the fine imposable upon conviction of criminal libel, the reasonable costs of litigation or, at most, a modest multiple of the actual damages sustained. This verdict did not comport with these or any other rational criteria and thus was tainted by a violation of the Constitution.

If the verdict was unconstitutional it was not saved by the remittitur required by the District Court. It is well established that a verdict based upon the jury's prejudice cannot be cured. A verdict violative of the Constitution is no less incurably defective. The vice of such a verdict is shown plainly in this case, since its magnitude exerted a substantial influence upon the Court's determination that the maximum sum that "should have been awarded . . . should be $400,000."

Even if the judgment must be tested by the District Court's award, without regard to the invalid verdict of the jury, the punishment imposed is repugnant to the Constitution. The District Court employed no standard other than its search for the highest punitive award that an appellate court had thus far sustained and, finding that statistic, more than doubled the top figure that it found. It neither sought nor used any objective standard in the measurement of the amount. Deeming the publication unprotected by the First Amendment, the Court took no account of the effect of the award, and of the threat of like awards in other cases, on the freedom the Amendment guarantees. The assessment was, therefore, entirely arbitrary and unprincipled and offensive to the Constitution on that ground. The offense was compounded by the size of the award which, as this Court said of the jury verdict in *New York Times*, creates "an atmosphere in which the First Amendment freedoms cannot survive" (376 U. S. at 278).

ARGUMENT.

I.

The Constitutional Limitations Enunciated by This Court in New York Times Co. v. Sullivan and Subsequent Decisions Govern the Review of a Verdict and Judgment Rendered Prior to the New York Times Decision, Although the First Amendment Was Not Invoked at the Trial.

The Court of Appeals held that by failing to invoke the First Amendment at the trial petitioner had waived the right to challenge the standard of liability applied by the District Court under the supervening ruling of this Court in *New York Times*. Its decision on this point was plainly wrong.

Ever since the early days of the Republic this Court has affirmed the duty of the courts of the United States to decide cases in accordance with the law prevailing at the time when they are called upon to render judgment, including, in the case of an appellate court, the time of the appellate judgment. *United States v. Schooner Peggy*, 1 Cranch 103 (1801). The doctrine applies to "*nisi prius* and appellate tribunals alike" (*Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543 [1941]) and has been reaffirmed repeatedly upon a supervening change in the law governing the cause, whether the change was worked by treaty, as in *Schooner Peggy*, by constitutional amendment, as in *United States v. Chambers*, 291 U. S. 217 (1934); *Massey v. United States*, 291 U. S. 608 (1934), by the repeal or the enactment of a statute, as in *United States v. Tynen*, 11 Wall. 88 (1870); *United States v. Alabama*, 362 U. S. 602 (1960); *Hamm v. Rock Hill*, 379 U. S. 306 (1964), by a novel interpretation of a statute, as in *Hormel v. Helvering*, 312 U. S. 552 (1941); *Helvering v. Richter*, 312 U. S. 561 (1941); *Uebersee Finanz-Korp. v. McGrath*, 343 U. S. 205, 212-213 (1952) or by a judicial alteration of a rule of

common law (*Vandenbark v. Owens-Illinois Glass Co., supra*). That the rule governs when the change in law derives from a revised interpretation of the Constitution by this Court, except in the rare case where the revision is expressly given a more limited prospective operation (*Johnson v. New Jersey*, 384 U. S. 719 [1966]), assuredly is not an open question. *O'Connor v. Ohio*, — U. S. —, 87 Sup. Ct. 252 (1966); *Rosenblatt v. Baer*, 383 U. S. 75 (1966); *Tehan v. Shott*, 382 U. S. 406, 409, n. 3 (1966); *Linkletter v. Walker*, 381 U. S. 618, 622-629 (1965); see also, *e.g., Griffin v. California*, 380 U. S. 609 (1965); *White v. Maryland*, 373 U. S. 59 (1963); *Jackson v. Denno*, 378 U. S. 368 (1964). Whether or not the change will be accorded retrospective operation on collateral attack upon a final judgment, it will, as this Court said in *Linkletter* "be given effect while a case is on direct review" (381 U. S. at 627).

The judicial duty thus defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefit at stages of the litigation prior to the time when it occurred. Such a condition would be patently unthinkable in cases where the change is wrought by legislative action, since no ruling could be premised upon unenacted legislation. *Cf. 149 Madison Avenue Corp. v. Asselta*, 331 U. S. 795 (1947), *modifying* 331 U. S. 199 (1947); *Alaska Juneau Gold Mining Co. v. Robertson*, 331 U. S. 793 (1947); *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446, 477 (1948). The situation is no different when the change is brought about by a decision modifying the hitherto prevailing rule. Here, too, a lower court must make its rulings prior to the change under the law that is established at that time. A litigant wishing himself to challenge the previously authoritative rule may, to be sure, be asked to lay the groundwork of that challenge in the lower court, futile though his effort there may be. *Cf. Yakus v. United States*, 321 U. S. 414, 444-445 (1944). The higher court will thus obtain the

benefit of ventilation of the issue in the court below before it must confront the novel question raised.[10] But neither this nor any other purpose of the legal system is subserved by insisting that a litigant anticipate a change he does not seek to bring about, under penalty of forfeiting its benefit if it should subsequently be ordained, while his case is still pending in the courts.

Even a State rule of procedure must be shown to serve a valid interest of the State judicial system if it is relied on to foreclose consideration of a federal contention. *Henry v. Mississippi*, 379 U. S. 443 (1965). A federal court can surely have no greater freedom to decree a forfeiture of constitutional protection on a ground that serves no useful purpose in administration of the law. Since the District Court, in ruling on petitioner's motion for new trial under Rule 60(b), held that the First Amendment as construed in *New York Times* did not protect the instant publication, it is clear that the anticipation of that issue at the trial by an objection to the charge would not in fact have served the slightest purpose.

That there was no anticipatory objection in *O'Connor, Rosenblatt, Griffin, White, Helvering* or *Uebersee* (*supra*, pp. 45-46) is, we submit, decisive of the proposition that it may not be required as a pre-condition to invoking supervening judgments of this Court.[11] It is, moreover, im-

10. Petitioner's motion for new trial, filed under Rule 60(b) promptly following the *New York Times* decision and before this judgment became final (*cf. Polites v. United States*, 364 U. S. 426, 433 [1960]), afforded the District Court an opportunity to rule on the effect of that decision prior to the Court of Appeals' review.

11. *Accord, e.g.*, as to *Mapp v. Ohio*, 367 U. S. 643 (1961): *United States ex rel. Carafas v. LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *cert. denied*, 381 U. S. 951 (1965); *United States ex rel. West v. LaVallee*, 335 F. 2d 230 (2d Cir. 1964); *Dillon v. Peters*, 341 F. 2d 337 (10th Cir. 1965); *United States ex rel. Dalton v. Myers*, 342 F. 2d 202 (3d Cir. 1965); *People v. Loria*, 10 N. Y. 2d 368 (1961); *State v. Smith*, 37 N. J. 481 (1962); *Commonwealth ex rel. Ensor v. Cummings*, 416 Pa. 510 (1965); *cf. Commonwealth v. Jacobs*, 345 Mass. 300 (1963); *People v. Kitchens*, 46 Cal. 2d 260, 262-263 (1956); as to *Malloy v. Hogan*, 378 U. S. 1 (1964) and

material in this connection that the decision of the court below was cast in terms of finding "waiver" by petitioner. For the sole ground of "waiver" was the failure to advance in the trial court *before* this Court's decision in *New York Times* "the constitutional grounds asserted in Times" to the knowledge of one of petitioner's co-counsel (R. 1259-1264, 1380-1386; 351 F. 2d at 709-711, 713, 733-735). If, as we submit, there was no duty to anticipate the ruling of this Court in *Times*, there was no basis for the finding made. See, *e.g.*, *United States ex rel. Angelet v. Fay*, 333 F. 2d 12, 16 (2d Cir. 1964), *aff'd*, 381 U. S. 654 (1965); *United States ex rel. Durocher v. LaVallee*, 330 F. 2d 303, 309-310 (2d Cir. 1964); *Cf. England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964); *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389, 393 (1937). The reference to a "known right or privilege" in *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938) and *Fay v. Noia*, 372 U. S. 391, 439 (1963) envisages, of course, a right known to exist, not one merely asserted in another litigation. Indeed, the Circuit Court's concern with "waiver" added to the forfeiture that it decreed the spectacle of an inquiry into the extent to which the various attorneys for petitioner were aware of the issues tendered in the pending suit against *The New York Times*. Far from supporting the determination of the Court, that "unseemly trial of Curtis' lawyers" (Rives, J., dissenting, R. 1392; 351 F. 2d at 739) adds further reason for its disapproval here.

That the *New York Times* decision broke new ground in holding that the First and Fourteenth Amendments impose limits on State libel law, as well as in its formulation

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Griffin v. California, 380 U. S. 609 (1965); *People v. Roberts*, 63 Cal. 2d 84 (1965); *State v. Lanzo*, 44 N. J. 560 (1965); *People v. McLucas*, 15 N. Y. 2d 167 (1965); as to *Escobedo v. Illinois*, 378 U. S. 478 (1964): *People v. Hillery*, 62 Cal. 2d 692 (1965); *King v. State*, — Del. —, 212 A. 2d 722 (1965); *State v. Clifton*, 240 Ore. 378 (1965). For other Court of Appeals decisions giving effect to supervening rulings not anticipated by an earlier submission, see, *e.g.*, *Sulzbacher v. Continental Casualty Co.*, 88 F. 2d 122 (8th Cir. 1937); *Ruppert v. Ruppert*, 134 F. 2d 497 (D. C. Cir. 1942); *United States v. O'Connor*, 237 F. 2d 466, 471 (2d Cir. 1965). See also *Kuchinic v. McCrory*, 422 Pa. 620 (1966).

of the nature of the limits they impose, is not a point we feel obliged to labor in this Court. See *New York Times Co. v. Sullivan*, 376 U. S. 254, 268, 279, 283, 297, 299 (1964). The doubt on this score entertained by the majority of the court below (R. 1259-1260; 351 F. 2d at 709) hardly comports with that court's previous position. See, *e.g.*, *Abernathy v. Patterson*, 295 F. 2d 452, 456 (5th Cir. 1961).

We also are content with a short answer to the argument of the respondent (*Response to Petitioner's Supplemental Statement*, pp. 3-6) that *Johnson v. New Jersey*, 384 U. S. 719 (1966), calls for limiting the application of the rule of *New York Times* to trials begun after the date of that decision. This Court has held the contrary in cases subsequent to *Times*, most recently in *Rosenblatt v. Baer*, 383 U. S. 75 (1966). It is, moreover, clear that *Johnson* was the product of the most exceptional considerations, namely, the justifiable reliance of law enforcement authorities on the earlier decisions of this Court and the "unjustifiable burden on the administration of justice" (384 U. S. at 733) involved in the reversal of all convictions obtained prior to *Escobedo v. Illinois*, 378 U. S. 478 (1964), or *Miranda v. Arizona*, 384 U. S. 436 (1966), and still pending on appeal. No similar considerations are presented here.

For the foregoing reasons, we submit that the Court of Appeals was legally obliged to test this judgment in the light of this Court's rulings in the *New York Times* and subsequent decisions; and that its compatibility with those decisions is, accordingly, a question open for consideration here. But even if the absence of an anticipatory objection at the trial engendered a discretion to apply or disregard the supervening judgments of this Court "as may be just under the circumstances" (28 U. S. C. § 2106; see *Hormel v. Helvering*, 312 U. S. 552, 556-557 [1941]), we think it clear that such discretion was abused by the decision to ignore the constitutional submission. For here the issue was presented in the District Court at the first reasonable opportunity following this Court's decision in *New York Times* (*cf. Herndon v. Georgia*, 295 U. S. 441, 444 [1935]; *Polites*

v. United States, 364 U. S. 426 [1960]); the District Court decided it upon the merits, its ruling making clear that any earlier submission would have had no influence on the result;[12] and only the unfounded ground of waiver was ad-

12. The Court of Appeals regarded as "persuasive" the respondent's suggestion that petitioner pleaded truth as a defense "rather than" raise a constitutional defense or invoke the privilege provisions of the Georgia Code (§ 105-709) "in order to get the right to open and close the arguments" (R. 1385-1386; 351 F. 2d at 735).

The right to open and close was, however, a concomitant of the burden of proof which Georgia law placed on the defendant if the plea of truth was made (R. 34; GA. CODE ANN. § 105-1801). There is no support whatever for the view that if that plea had been coupled with additional affirmative defenses, the burden would have shifted to the plaintiff under Georgia law. Moreover, if the defendant had advanced a constitutional defense, either separately or in conjunction with the plea, it presumably would have been stricken upon motion under Rule 12(f).

If the respondent meant by his suggestion that a plea of truth could not be coupled with affirmative defenses, so that defendant was required to elect between them, it is clear from Rules 8(e) and 12(b) that he is wrong. Indeed, if he were right, and the defendant had to choose between a plea that it thought valid and an as yet unestablished federal defense, its choice to rely upon the plea would not establish waiver of the federal protection. *Cf. Fay v. Noia*, 372 U. S. 391, 439 (1963); *Green v. United States*, 355 U. S. 184, 192-194 (1957); *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964); *Whitus v. Balkcom*, 333 F. 2d 496 (5th Cir. 1964).

It is true that GA. CODE ANN. § 105-709 provides that "Comments upon the acts of public men in their public capacity and with reference thereto" are "deemed privileged communications," unless "the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted" (GA. CODE ANN. § 105-710). As in most states, however, the privilege does not protect a publication "if untrue and libelous"; the statements made must be "supported by the facts." *Barwick v. Wind*, 203 Ga. 827, 831 (1948); *Kirkland v. Constitution Publishing Co.*, 38 Ga. App. 632 (1928), *aff'd by equally divided court*, 169 Ga. 264 (1929); *Lowe v. News Publishing Co.*, 9 Ga. App. 103 (1911); see Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896, n. 102 (1949). Here, as in *New York Times Co. v. Sullivan*, claiming the statutory privilege would have added nothing to the plea of truth. *Cf.* 376 U. S. at 267, 278-280. The test of "malice" under § 105-710 is, moreover, different from the *New York Times* standard.

duced to justify withholding an adjudication. Even after a plea of *nolo contendere,* this Court has been astute to grant an opportunity to a defendant to present a possible defense established by a subsequent decision. *United Brotherhood of Carpenters v. United States,* 330 U. S. 395, 411-412 (1947); *cf. United States v. Ohio Power Co.,* 353 U. S. 98 (1957); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964); *Gondeck v. Pan American World Airways, Inc.,* 382 U. S. 25 (1965). No less solicitude is due to a defendant who has not confessed to judgment, when enormous punishment has been imposed and the supervening ruling goes to First Amendment rights.

II.

The Publication Was Protected by the First Amendment and Entitled to the Privilege Established by the Rule of New York Times.

The District Court in ruling on the motion for new trial under Rule 60(b) held that the publication here in suit was not protected by the ruling of this Court in *New York Times Co. v. Sullivan* because the respondent was not a "public official" within the meaning of the rule this Court laid down. The only other judge who passed upon the issue, Judges Rives dissenting in the court below, squarely rejected this conclusion. We submit that the principle of *New York Times* applies and that the publication was entitled to the privilege defined by that decision.

A. The Plaintiff Was a "Public Official" Under the Criteria Established by This Court in Rosenblatt v. Baer, 383 U. S. 75 (1966).

In *Rosenblatt,* the plaintiff, who had been employed by County Commissioners as Supervisor of the Belknap County Recreation Area, a public recreation facility operated by the County principally as a ski resort, obtained a judgment of $31,500, based upon a publication held to

libel him by impugning the honesty of those in charge of the financial operation of the Area during the period of his incumbency. The judgment was reversed by this Court on two grounds: first, that the instructions of the New Hampshire trial court contravened the First Amendment in permitting the jury "to find liability merely on the basis of" the plaintiff's "relationship to the government agency, the operations of which were the subject of discussion" and "without regard to evidence that the asserted implication of the column was made specifically of and concerning him" (383 U. S. at 82); and, second, that the plaintiff as Supervisor of the Area "may have held" a position as a "public official" (383 U. S. at 87) within the meaning of the *New York Times* rule, and thus be barred from a recovery for defamation by a publication critical of his performance of his duties, without proof of malice as defined by *Times*. Though the first ground of reversal is irrelevant, the second is decisive of this cause.

First: We recognize that *Rosenblatt* did not definitively hold that if the publication implying dishonesty in the financial management of the Area could be found to make a reference to Baer, the privilege of *New York Times* must necessarily apply. What the opinion states explicitly is that Baer's theory "that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations"—the theory advanced at the trial to establish that the article referred to him—"at the least, raises a substantial argument that he was a 'public official' " within the limitations of the rule of *New York Times* (383 U. S. at 87). How substantial that argument was thought to be is indicated, in our view, by the Court's statement that one of the reasons for not foreclosing Baer from "attempting retrial of his action" was that the record, made before the *New York Times* decision, left "open the possibility that respondent *could have* [emphasis supplied] adduced proofs to bring

his claim outside the *New York Times* rule" (383 U. S. at 87-88). The "proofs" referred to must, we think, envisage evidence showing that the scope of Baer's responsibility was less extensive than he sought to show at the first trial. The disposition is, therefore, instinct with affirmation that if Baer was, indeed, responsible for the management of the Ski Area criticized by the publication, the privilege would attach to statements that impugned his honesty or his efficiency in the performance of that task.

No other conclusion appears to us to be consistent with the general criteria embodied in the Court's opinion, namely, that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" (383 U. S. at 85); and that where "a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees" (383 U. S. at 86), malice in the *New York Times* sense must be proved. It was not doubted that the operation of the publicly-owned Ski Area involved the "conduct of governmental affairs" and could not have been doubted that if Baer's position involved "substantial responsibility" for the management of the Area, the public had "an independent interest" in his "qualifications and performance . . . beyond the general public interest in the qualifications and performance of all government employees." Such reservation as there was in the Court's ruling must, therefore, we submit, be understood as a reflection of uncertainty as to whether and how far Baer was in fact involved in those aspects of the management of the Area that were attacked by the challenged publication, not as a legal doubt that if he was responsibly involved, he must prove malice to recover.

On this analysis, the *Rosenblatt* decision plainly governs disposition of this cause. Here, as in *Rosenblatt,* the official status of the plaintiff was not litigated as such at the trial. But there was no dispute, and could have been none, that as Athletic Director respondent had, in his own words, "responsibility for . . . general supervision of the entire athletic program at the University of Georgia" (R. 492), including the "big business" (R. 492) of college football. See p. 36, *supra.* If actual or apparent responsibility for the management of a public recreation area suffices to accord the privilege to charges of malfeasance in performance of that function, there can be no basis for a contrary result when the responsibility to which the charge relates entails the management of the program of athletics of a University established, maintained and supported by the State. There surely is no smaller or no less legitimate a public interest in the conduct of athletics as an aspect of a State-conducted public education program than in the use of public land and facilities for purposes of recreation. The "scope of the privilege is to be determined," as the Court said in *Rosenblatt,* "by reference to the functions it serves" (383 U. S. at 85, n.). In the one case no less than in the other, the privilege is necessary to protect the freedom of the press to criticize the way in which an important public trust has been discharged, a freedom that the First Amendment surely was designed to make secure.

Second: Respondent's answer to the patent parallel between this case and *Rosenblatt* is that he was not employed as Athletic Director by the Board of Regents of the University System, the governing body of the University (Ga. Const. Sec. IV, par. I; Ga. Code Ann. §§ 32-101, -104, -112, -113), but rather by the Athletic Association of the University, a separate corporate entity composed of a Board of faculty members and alumni (see p. 35, *supra*), which a statute of 1949 declares "not to be" an agency of the State and the accounts of which the statute exempts from the State audit required "in connection with the

financial operations of State agencies" (GA. CODE ANN. §§ 32-153, -154). The Athletic Association, it is urged, "was thus not an arm of government" and the respondent as its employee could not "be engaged in government while performing its functions" (*Further Response,* p. 4).

We submit that the distinction is without significance for purposes of measuring the ambit of the privilege established by the principle of *New York Times.* The statutory declaration that the Athletic Associations of the State Universities are "not to be agencies of the State" can obviously have no greater import in determining how far freedom to criticize their operations or the operations of their managerial employees is protected by the First Amendment than the State definitions of the term "public official" that were held to be irrelevant in *Rosenblatt v. Baer.* The one denomination no less than the other was developed "for local administrative purposes, not the purposes of a national constitutional protection," with the result that it is "at best accidental" if the State-law standard should "reflect the purposes of *New York Times*" (383 U. S. at 84).

That this State terminology is wholly unrelated to the purpose of the privilege is very clear. The fact that the Athletic Association or, as it is often called, Athletic Board (*e.g.,* R. 189, 807, 823), is exempted from State-imposed procedures governing expenditures, contracting and accounting (*e.g.,* GA. CODE ANN. §§ 40-1805, -1808, -1902, -1906.1, -2001; see R. 875-876) does not detract from the fact that its sole function is to play a part in the management and government of the State University, subject to the ultimate responsibility and control of the President, the Chancellor and the Board of Regents (R. 189, 823, 832). The athletic program, the administration of which was governed by the Board, was the program of the University. The position of Director of Athletics, though the incumbent was chosen and paid in major part (see p. 36, *supra*) by

the Association, was that of Director of Athletics of the University of Georgia.

The role of the Association as an organ of administration of the University has not, indeed, significantly changed since the Board of Regents and the State contended in this Court that "public education is a governmental function" and that "the holding of athletic contests is an integral part of the program of public education conducted by Georgia." *Allen v. Regents of the University System*, 304 U. S. 439, 449 (1938). The President of the University is Chairman of the Association and of its Executive Committee (R. 823, 832). The Comptroller and Treasurer of the University is Treasurer of the Association (R. 189, 868). A majority of the members of the Board are members of the faculty, as required by the Southeastern Athletic Conference,[13] to which Georgia belongs, and they are chosen by the President (R. 189, 595, 769, 808, 874-875). In short, nothing distinguishes the Athletic Association from any other entity responsible for the administration of the programs of the University except that it has a larger measure of financial autonomy and that there is a minority participation of alumni. To accord these differentia constitutional significance would trivialize the principle of *New York Times*. The considerations that preclude a State from avoiding the limitations of the Fourteenth Amendment by the delegation of its public functions are, we believe, even more plainly applicable here. *Cf. Burton v. Wilmington*

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13. This requirement tends to comply with the first recommendation of the Report of the Special Committee on Athletic Policy of the American Council on Education, approved by the Executive Committee of the Council in 1952, that as "in all other educational activities, the control of athletics should be held absolutely and completely by those responsible for the administration and operation of the institution." See *Council Action on Athletic Policy*, THE EDUCATIONAL RECORD, vol. xxxiii, pp. 246, 249 (1952). A study by the Carnegie Foundation, published in 1929, listed Georgia as an institution in which "genuine faculty control" of the regulation of college athletics had been found. SAVAGE, AMERICAN COLLEGE ATHLETICS, p. 101 (Carnegie Bulletin No. 23).

Parking Authority, 365 U. S. 715 (1961); *Evans v. Newton*, 382 U. S. 296 (1966).

Third: In his original response to the petition for a writ of *certiorari*, respondent sought to draw strength from this Court's decision in the *Allen* case that State immunity to federal taxation did not extend to gate receipts for public admission to athletic contests of the University, since the exhibition of such contests is "a business having the incidents of similar enterprises usually prosecuted for private gain" (304 U. S. at 452). *Response*, p. 24. The District Court accorded weight to this submission in denying the petitioner's motion for new trial (R. 1124).

It is enough to point to *Rosenblatt* to answer this contention. The conduct of a public recreation area, charging admission fees, also involves a "business comparable in all essentials to those usually conducted by private owners" (304 U. S. at 451), yet no importance was attributed to that fact in considering if *New York Times* applied. The reason is entirely obvious. The fact that government undertakes enterprise similar to that in which non-governmental entities engage does not diminish, and at times may well enhance, the need for freedom of discussion of the way in which the public enterprise is run and of the honesty or the efficiency of those who have it in their charge. The policies that govern the extent of governmental tax immunity have no relationship at all to those that measure the extent of the protection conferred by the First Amendment.

Fourth: There is no greater merit in other distinctions the respondent seeks to draw between this case and *Rosenblatt*.

The suggestion (*Further Response*, p. 5) that there was no issue as to Butts' performance of his duties as Athletic Director prior to the instant publication is not true [14] and,

14. Burnett reported his story to the University authorities before he disclosed it to petitioner and it was being investigated by, *inter alia*, the President of the University, a member of the Georgia

even if it were, would be irrelevant. What is decisive is the scope of his responsibility for supervising the entire athletic program of the University. If his position was "one which would invite public scrutiny and discussion of the person holding it" (383 U. S. at 87, n.), as we submit it plainly was, the privilege must necessarily apply to the first published criticism of his official conduct, no less than to the later publication of a criticism previously made.

Nor is there force in the submission that the criticism here involved "did not relate to his conduct of his duties as Athletic Director" (*Further Response*, pp. 6-7) because the Football Coach, not the Director, was responsible for formulating the team's plan and strategy. It was because he was Director that respondent had access to the team's secret practice sessions (see R. 297; p. 24, *supra*). It was as Director that he was responsible for scheduling the game with Alabama (p. 36, *supra*) and, perforce, for safeguarding its full integrity as a scholastic competition. It might as well have been contended in *Garrison v. Louisiana*, 379 U. S. 64 (1964), that the defendant's insinuations that the judges were subject to "racketeer influences" (379 U. S. at 66) did not relate to their official conduct since they were not authorized by their commissions to pervert the course of justice.

Fifth: It may be asked if our contention, that respondent as Director of Athletics was a public official for the purpose of the rule of *New York Times*, implies that every member of the faculty of a State University is in the same position. We do not blink the possibility that this may be the right conclusion, since, as we contend below, we think the privilege ought to apply to any statement challenged as a defamation if the First Amendment protects freedom

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Athletic Association, the Chancellor of the University System, the Chairman of the Board of Regents of the University System, the Commissioner of the Southeastern Athletic Conference and the President of the University of Alabama. See pp. 19-24, *supra*.

of expression on the subject matter of the statement. See pp. 63-65, *infra*. On the other hand, we think it sound to point to possible distinctions that would justify reserving resolution of that issue in this case. For one thing, a member of the faculty is not as such charged with a supervisory or managerial responsibility to which the criteria laid down in *Rosenblatt* would easily apply. But more than this, freedom of teaching, research and scholarship is itself protected by the First Amendment. See *Sweezy v. New Hampshire*, 354 U. S. 234, 250-251, 261-263 (1957). To the extent that a defamatory statement jeopardizes academic freedom in conducting such activity, it may be thought that liability unqualified by privilege *pro tanto* safeguards "values nurtured by the First and Fourteenth Amendments" and may thus avoid the "thrust of *New York Times*" (383 U. S. at 86). That proposition must be weighed against the argument *per contra* that the accommodation that resolves the "tension" (383 U. S. at 86) between First Amendment values and the social interest in protecting reputation is no less appropriate in dealing, in addition, with conflicting interests in the freedom of expression.

We submit that a less subtle problem is presented by this case. The respondent was responsible for supervision of the University's athletic program. Neither that program nor its supervision involves modes of self-expression comprehended in the freedom that the First Amendment guarantees. But since the management of a State University is plainly a governmental enterprise, criticism of the operation of the program of athletics or of the quality or the integrity of its direction "is at the very center of the constitutionally protected area of free discussion" (383 U. S. at 85). The social "interest in preventing and redressing attacks upon reputation" must, accordingly, yield place to the "values nurtured by the First and Fourteenth Amendments" (383 U. S. at 86) to the extent required by the privilege of *New York Times*.

B. The Public Interest in the Subject Matter of the Publication Requires That the Privilege Apply.

The public interest in the quality and the integrity of the respondent's conduct as Director of Athletics does not derive only from the fact that Georgia is a State University, decisive as that fact is to accord the privilege of *New York Times* to statements critical of his discharge of his official duties. The integrity of college football is a matter about which the public has important and legitimate concern, whoever the participants, because it is a phase of higher education. This public interest in the subject matter of the publication suffices, we contend, to gain it the protection of the First Amendment and the privilege prescribed by *New York Times*.

First: "Criticism of government is at the very center of the constitutionally protected area of free discussion" (383 U. S. at 85) but it assuredly is clear that this is not the only subject on which freedom of expression is protected by the First Amendment. *Cf., e.g., Thornhill v. Alabama,* 310 U. S. 88 (1940); *Thomas v. Collins,* 323 U. S. 516 (1945); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U. S. 1 (1964); *Kingsley International Pictures Corp. v. Regents,* 360 U. S. 684 (1959); *Jacobellis v. Ohio,* 378 U. S. 184 (1964). It was, indeed, said by the Court in *New York Times,* and repeated in the subsequent decisions, that our "profound national commitment" is to "the principle that debate on *public issues* [emphasis supplied] should be uninhibited, robust and wide-open . . ." (376 U. S. at 270). We think that "public issues" must include, at the least, any subject of discussion as to which the public has important and legitimate concern.[15]

15. This has been the almost universal view of commentators on the *New York Times* decision. See, *e.g.,* Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L. Q. 581, 591-595 (1964); Bertelsman, *Libel and Public Men,* 52

Second: That this publication was addressed to a public issue, in the sense defined above, is wholly clear.

James Bryant Conant is not alone in the belief that the "strength of this republic is . . . intimately connected with the success or failure of our system of public education." EDUCATION IN A DIVIDED WORLD (1948) p. 1. As President Kennedy stated in his Special Message to the Congress proposing the measure that became the Higher Education Facilities Act of 1963 (77 Stat. 363), "from every point of view, education is of paramount concern to the national interest as well as to each individual." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, 1963, p. 106. Because of the magnitude of that concern, Congress, as President Kennedy put it in an earlier message (*id.*, 1962, p. 111), "has repeatedly recognized its responsibility to strengthen our educational system without weakening local responsibility," citing enactments reaching back to the Northwest Ordinance of 1787 and the Morrill Act of 1862.

To affirm public concern in education is, of course, to affirm such concern in all the problems it confronts, which never were of greater moment than they are in our time.

A. B. A. J. 657, 661 (1966); Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L. J. 642, 645 (1966); Comment, *Defamation of Public Officials—Free Speech and the New Constitutional Standard*, 12 U. C. L. A. L. REV. 1420, 1446-1447 (1965). *But cf.* Note, *New York Times Co. v. Sullivan—The Scope of a Privilege*, 51 VA. L. REV. 106, 114 (1965).

Viewed in these terms, the First Amendment would be taken to incorporate the common law privilege of fair comment, as applied in those States which do not accept the limitation that statements of fact must be proved true. *Cf. Coleman v. MacLennan*, 78 Kan. 711, 723 (1908) (quoted in *New York Times*, 376 U. S. at 281-282): "This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office." See also, *e.g.*, PROSSER, TORTS § 110 (3d ed. 1964); RESTATEMENT OF TORTS § 606 *et seq.* (1938); *Hoeppner v. Dunkirk Printing Co.*, 254 N. Y. 95 (1930) (criticism of high school football coach). The scope and limits of the common law privilege are ably discussed by Judge Leventhal in *Afro-American Publishing Co. v. Jaffe*, 366 F. 2d 649 (D. C. Cir. 1966).

The maintenance of the integrity of the athletic programs of the colleges and universities that engage in intercollegiate competition does not pose the largest issue in the field of higher education but it has presented an important problem through the years. Its importance is attested by the Report of the Special Committee on Athletic Policy of the American Council on Education, composed of eleven Presidents or Chancellors under the chairmanship of John A. Hannah of Michigan State, which was unanimously approved by the Executive Committee of the Council in 1952. The Report (*Council Action on Athletic Policy,* THE EDUCATIONAL RECORD, vol. xxxiii, pp. 246-255) states, *inter alia:*

> American colleges and universities engage in intercollegiate athletics because of a deep conviction that when properly administered they make an important contribution to the total educational services of the institution. There is an increasingly widespread awareness, however, that athletics may become so severely infected with proselyting, subterfuge, and distorted purpose as to more than neutralize the benefits. Certainly the abuses and suspicion of abuse now associated with the conduct of intercollegiate athletics foster moral apathy and cynicism in our students—those young men and women who increasingly share responsibility for this country's strength and freedom.
>
> The urgency of the problem is even more apparent in the context of current external and internal threats to our society. In the last analysis, the strength of our free society depends not only upon armaments but also upon the integrity of our institutions and our people.
>
> This committee, after consulting competent authorities, has reluctantly reached the conclusion that in intercollegiate athletics as now conducted, despite the adherence by many institutions to the highest standards, serious violations not only of sound educational

policies but also of good moral conduct are not in fact uncommon. Wherever these exist, they can only be injurious to athletics, to our schools and colleges, and especially to our youth.

The present situation has been brought about by external pressures and internal weaknesses evident during a considerable period. The rewards in money and publicity held out to winning teams, particularly in football and basketball, and the desire of alumni, civic bodies, and other groups to see the institutions in which they are interested reap such rewards, have had a powerful influence on many colleges and universities. The influence has been magnified when control of athletic policy has been permitted to slip from the hands of the faculty and central administration.[16]

Third: If, as we contend, the First Amendment protects freedom of discussion of the subject of the publication, we submit that the privilege of *New York Times* should be determined to apply.

In *New York Times* this Court held that a "defense for erroneous statements honestly made" is constitutionally required because allowance of the defense of truth alone "with the burden of proving it on the defendant, does not mean that only false speech will be deterred." "Under such a rule," as the Court said, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so" (376 U. S. at 278-279). The critic of non-governmental action obvi-

16. *Cf.* SAVAGE, *op. cit. supra* note 13, p. 32: "Whatever the reason, it is certain that the seriousness with which college athletics are nowadays taken has driven certain well-recognized abuses under cover, but at the same time has propagated and intensified them." See also, *e.g.*, MILLER, THE TRUTH ABOUT BIG TIME FOOTBALL (1953) *passim;* Guthrie, *No More Football for Us!*, SAT. EV. POST, Oct. 13, 1951, p. 24.

ously faces the same problem, leading to "self-censorship" no less severe if he must "guarantee the truth of all his factual assertions" and "do so on pain of libel judgments virtually unlimited in amount" (376 U. S. at 279). In the latter case, no less than in the former, if the criticism is protected by the First Amendment, the burden upon speech or publication must be taken to abridge the freedom the Amendment guarantees.

A contrary result would involve holding, in effect, that freedom to criticize non-governmental action is protected by the Constitution only if the statements made can be proved to the satisfaction of a jury to be true. We submit that the Framers of the First Amendment were too well aware of the vicissitudes of jury action to attribute to them any such attenuated safeguard of the freedom they sought to secure.

This submission does not deny that, as the Court observed in *Rosenblatt* (383 U. S. at 86), society "has a pervasive and strong interest in preventing and redressing attacks upon reputation." It recognizes, rather, that the qualified privilege of *New York Times* itself embodies an accommodation of the conflicting interests in protecting reputation and protecting freedom of expression. The principle of the accommodation, limiting liability to utterances proved to be knowingly or recklessly false, is similar to that which elsewhere has been deemed essential to sustain a curb on speech or publication (*e.g.*, *Dennis v. United States*, 341 U. S. 494, 516 [1951]; *Smith v. California*, 361 U. S. 147 [1959]; *cf. Wieman v. Updegraff*, 344 U. S. 183 [1952]; *Speiser v. Randall*, 357 U. S. 513 [1958]), assimilating the criteria of libel law in this respect to those demanded by the Constitution in related fields. See *New York Times Co. v. Sullivan*, 376 U. S. at 278-279. We see no reason why this same accommodation should not govern liability for statements that reflect on non-official persons, if the same conflicting interests are involved. It would be strange, indeed, if limitations that this Court has found appropriate

to protect the congressional policy "to encourage free debate on issues dividing labor and management" (*Linn v. United Plant Guard Workers*, 383 U. S. 53, 62 [1966]) were not applied with equal vigor to protect the First Amendment policy of freedom of expression.

In a society in which the relationship between government and private enterprise assumes as many diverse forms as in our own, including the magnitude of private power and the extent of public subsidy, the freedom that the Constitution deems most vital for correction of abuses ought not to be circumscribed by artificial lines.

III.

Respondent's Argument That "Actual Malice Within New York Times Was Conclusively Proven" Is Both Legally Immaterial and Wholly Unsupported by the Record.

In the effort to avoid review and reversal of this enormous judgment, respondent argues that malice in the sense of *New York Times* was "conclusively proven". *Further Response*, p. 7; *Response*, p. 26. The argument is legally immaterial and wholly unsupported by the record.

First: The argument is legally immaterial because, respondent notwithstanding (*Response*, p. 33; *Further Response*, p. 9), the instructions to the jury did not call on it to make a finding that comports with the requirements of *New York Times*.

As we have said above (p. 34), the District Court charged that "actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" (R. 1026). It is too plain for argument that this instruction does not condition the punitive award on finding that a false statement was made "with knowledge that it was false or with reck-

less disregard of whether it was false or not" (*New York Times Co. v. Sullivan,* 376 U. S. 254, 280) or make clear that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times*" (*Garrison v. Louisiana,* 379 U. S. 64, 74 [1964]) may be the basis of recovery. The charge, precisely like those held erroneous in *Times, Garrison, Henry v. Collins,* 380 U. S. 356 (1965) and *Rosenblatt* (383 U. S. at 83-84), allowed "recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood"[17] (380 U. S. at 357) or even short of this, a merely "negligent misstatement" (383 U. S. at 84). The grounds for reversal in the previous decisions are, accordingly, presented here.

By the same token, it is wholly immaterial that the District Court gave as a ground for the denial of the motion for new trial that "there was ample evidence from which a jury could have concluded that there was a reckless disregard of whether the article was false or not" (R. 1124-1125). The simple and decisive fact is that the question was, at most, for the decision of the jury under an appropriate instruction. It was not decided by the jury since no issue was submitted in these terms.

Second: There is no support for the contention that knowledge of falsity or reckless disregard was "conclusively proven" at the trial.

We note *in limine* that this is an entirely paradoxical submission since the trial court's ruling that there was a jury question on defendant's plea of truth despite the burden of persuasion placed on the defendant (R. 354-359) and its statement in the charge that there "has been a sharp conflict in the testimony in this case" (R. 1029) apply *a fortiori* if the plaintiff must establish falsity and

17. That petitioner was well aware that the publication threatened harm to the respondent was, of course, readily admitted (R. 715, 770).

reckless disregard. Indeed, the syllogism is not only valid with respect to the issue of truth, as to which *Times* would shift the burden to the plaintiff. It is also valid on this record with respect to reckless disregard, since the defendant's evidence of truth was, apart from small detail, included in the evidence that led the publisher to think the story true when it was published. How the same evidence that would have justified a jury verdict that the statement was essentially the truth could fail to justify the publisher's conviction of its truth, the respondent as yet has not explained.

It is, in short, entirely plain that on the record as evaluated by the District Court at the trial a jury correctly instructed as to the burden of proving falsity and the required proof of malice could have reasonably found for the defendant. Indeed, the record in this case yields a graphic demonstration of the difference in defending libel actions between the criterion of liability enunciated at the trial and that prescribed by *New York Times*. Extra-judicial statements of reliable informants are inadmissible to prove the truth of their assertions and the jury cannot find for the defendant on the plea of truth without convicting the plaintiff of the misconduct the publication charged. Moreover, on the issue of punitive damages, the decision as to whether "actual malice" has been proved is made on the assumption that the publication was false, since the defendant did not persuade the jury of its truth.

For the reasons stated we believe reversal is required whether or not the evidence would have sustained a jury finding that the publication was malicious; and that the Court is not, therefore, obliged to make its own appraisal of the record. But were the evidence to be considered, we should strongly urge that far from the conclusive proof to which respondent has referred, it lacks entirely "the convincing clarity which the constitutional standard demands" (*New York Times Co. v. Sullivan*, 376 U. S. at 285-286).

As we show in detail in the Statement (pp. 28-32, *supra*), petitioner in publishing the article relied essentially on Burnett's sworn statement as to what he had overheard and a number of circumstances tending to corroborate his story. Those circumstances were ascertained in the course of the *Post*'s investigation prior to the publication, an investigation conducted by Frank Graham, an experienced sports writer, who subsequently wrote the article, and Furman Bisher, a sports editor of *The Atlanta Journal*, who had independently called the attention of the *Post* to Burnett's charges.

Among the corroborating circumstances were the facts that Burnett before talking to the *Post*, and at a time when he had no motive to falisfy, had reluctantly reported his charges to Coach Griffith and consented to Griffith's laying them before the University authorities, who had promptly initiated an investigation; that Milton Flack, whom Burnett claimed to have told about the conversation on the day that it occurred, confirmed that he had done so; that Burnett had voluntarily submitted to a lie detector test requested by the University authorities and passed; that the records of the Southern Bell Telephone Company confirmed the fact that a call had been made by Butts to Bryant on September 13, 1962; that Burnett claimed to have taken notes while he listened to the conversation; that the notes had been seen by Flack and Griffith; that the notes, together with Burnett's charges, were believed by Coach Griffith to be sufficiently important to report them to the University authorities; that on the occasion when Burnett saw Griffith, Griffith indicated that he found the notes revealing and that he had a suspicion that someone had been giving information to Alabama; that when Butts was called before the University authorities he refused to take a lie detector test and the next day submitted his resignation as Director of Athletics; that the Georgia-Alabama game was a fiasco for Georgia; that Furman Bisher, purporting to have talked to people at the University, called Graham on March 1

and reported statements that he claimed were made by Georgia player Babb, Georgia trainer Richwine, and Coach Griffith, all of which tended to support the proposition that the Alabama team was familiar with Georgia's plays and formations; that two weeks before the *Post* issue went on sale, the completed story was sent to Bisher by Graham and Bisher made no comments or suggestions.

On the basis of this information Clay Blair, Jr., the *Post*'s then editor-in-chief, and Davis Thomas, its managing editor, whose testimony the respondent took by deposition, swore that they were satisfied of the truth of the assertions in the publication.

Against the foregoing circumstances of corroboration, the respondent points to the fact that no representative of the *Post* saw Burnett's notes before the article was published, efforts to obtain them from the University authorities proving unavailing; that the *Post* knew that at a meeting with the University authorities on February 21, 1963, Burnett was confronted with the fact that he had been convicted and placed on probation on a charge of cashing two checks totalling $45 against insufficient funds (a dereliction the respondent's counsel charitably asserts established that he was known "as a bad-check artist" [*Response*, p. 27]); that the *Post* did not interview John Carmichael, Burnett's office associate, to whom Burnett claimed he had reported the Butts-Bryant conversation immediately after overhearing it on September 13 (a report very substantially confirmed by Carmichael in his testimony at the trial), because it was known that Carmichael had opposed Burnett's disclosure and would not be cooperative; that the *Post* did not review the film of the Alabama-Georgia game, though its sports editor wished to do so; that neither Butts nor Bryant was interviewed in the *Post*'s investigation; that some of the quotations of statements of Georgia players and football staff, given Graham by Furman Bisher, were used without interviewing the quoted parties, who denied at the trial that they had made them; that the *Post* did not

interview any coach or member of the Alabama team; that seven days before the publication date of the story, the respondent's counsel sent a telegram and letter to the *Post* stating without specification that the proposed content of the article was false; that during the week before the publication the respondent's daughter telephoned Clay Blair and tearfully requested him to forego publication; and, finally, that a demand for a retraction was presented and ignored.

We submit that this evidence affords no sufficient basis for concluding that petitioner's agents published the Graham article knowing that its essential statements were false or with a "high degree of awareness of their probable falsity." The important statements were derived in every instance from informants on whose truthfulness and accuracy the *Post* editors had reason to and did rely.

As another panel of the court below has recently observed in reversing a libel judgment, a "reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." *New York Times Co. v. Connor*, 365 F. 2d 567, 576 (5th Cir. 1966). See also *Washington Post Co. v. Keogh*, 365 F. 2d 965 (D. C. Cir. 1966). It may be argued that the petitioner's investigation was in some respects inadequate. But even if the argument should be sustained, we think it clear that the inedequacy claimed may point to negligence but nothing more.

Respondent's statement that "Curtis was informed of the falsity of the story" by his counsel's telegram and letter and his daughter's phone call (*Response*, p. 26) is, we think, entirely disingenuous. If a denial unaccompanied by information or a mere appeal for sympathy suffices to defeat the privilege of *New York Times*, the great principle of that decision would be nullified at once in application. The opinion happily makes clear that it was not envisaged that such nullification should prevail (376 U. S. at 286-288).

It remains to add that the respondent drew great strength before the jury, and seeks to draw strength here, from statements by Clay Blair, Jr., the *Post*'s editor-in-chief, that he wished to change the image of the *Post*, to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" and that "the final yardstick" of this policy was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." He also described the issue containing the publication here involved, as "a step in the right direction," adding that with this issue "we have gone twenty-five per cent toward the goal of the magazine I envision" (pp. 32-33, *supra*).

This is admittedly language that invites inflammatory misconstruction. Read in connection with the evidence we have detailed, we do not think that it permits a finding that petitioner embarked on a policy of grave indifference to the truth and that the instant publication was a product of such reckless disregard. The "high degree of awareness" of the "probable falsity" of challenged statements demanded by the rule of *New York Times* calls, in our submission, for a judgment based upon the sources of the publication and their actual impact on the minds of those responsible for the derogatory statements made. Judged in these terms, we think the evidence makes clear this was an entirely honest publication, reflecting the conviction of the agents of the *Post* that Burnett was a credible informant, whose story was sufficiently confirmed to be believed.

IV.

The Award of Punitive Damages Violates the First and Fifth Amendments.

Whether or not the rule of liability applied in the District Court is consistent with the First Amendment, the verdict and the judgment in this cause are repugnant to the Constitution.

First: The jury verdict of $3,000,000 punitive damages for a publication causing "actual damages," including mental anguish and humiliation (R. 1024), assessed at $60,000, was not only "grossly excessive", as the District Court has found; it contravened the First Amendment and entailed a deprivation of due process. These points were made against the verdict by the motion for new trial (R. 36-37) and were, therefore, plainly open on appeal from the judgment.

We concede *arguendo* that an award of damages imposed as a deterrent to the defendant and to others and "to protect the community" (R. 1026) is not *per se* invalid in a civil case, as this Court said long ago in *Day v. Woodworth,* 13 How. 363, 370-371 (1851).[18] When such an award is used, however, as a means of regulating publication, it is clear that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940). For that reason, even though a measure burdening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser v. Randall,* 357 U. S. 513, 520 [1958]) and "viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U. S. 479, 488 (1960). See also, *e.g., Grosjean v. American Press Co.,* 297 U. S. 233 (1936); *N. A. A. C. P. v. Alabama,*

18. The classic statement of the contrary position is by Justice Foster in *Fay v. Parker,* 53 N. H. 342 (1872). The nineteenth century debate upon the issue is fully indicated by GREENLEAF, EVIDENCE (Lewis ed. 1896) § 253, n. 2, p. 294 *et seq.*; THEODORE SEDGWICK, MEASURE OF DAMAGES (8th ed. 1891) § 348 *et seq.*; FIELD, DAMAGES (1876) § 72 *et seq.* It is ironical that such awards appear to go back to the actions based on the general warrants issued by the Earl of Halifax, where the defendants were officials who could not have been expected to "protect the community" against themselves. The cases are summarized in SAYER, THE LAW OF DAMAGES (1792) p. 218 *et seq.*

For a modern analysis, see Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173 (1931).

357 U. S. 449 (1958); *Smith v. California,* 361 U. S. 147, 150-151 (1959); *Bates v. Little Rock,* 361 U. S. 516 (1960); *Freedman v. Maryland,* 380 U. S. 51 (1965). As Mr. Justice Brandeis said long ago: "A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." *Whitney v. California,* 274 U. S. 357, 377 (1927) (concurring opinion). Indeed, quite apart from the protection of the First Amendment, this Court has held that a penalty or money judgment deprives of property without due process if it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." *Life & Casualty Co. v. McCray,* 291 U. S. 566, 571 (1934).

Since the First and Fifth Amendments apply to all the agencies of government (*N. A. A. C. P. v. Alabama,* 357 U. S. 449, 463 [1958]; *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58, 68 [1963]), a jury verdict must be tested by these standards, no less than a judicial or administrative action or an act of legislation.

So tested, we believe it clear that the $3,000,000 verdict, representing 65 per cent of the defendant's retained earnings (Pl. Ex. No. 22, R. 1053, 1054), was in violation of the Constitution. The verdict plainly was designed to put defendant out of business and was thus, as Judge Rives said below (R. 1296; 351 F. 2d at 728), equivalent to a prior restraint. Prior restraint or not, it takes no argument to show that such a penalty, imposed in addition to full compensation for all injury believed to be inflicted on the plaintiff and the mitigation of such injury involved in the mere fact of verdict, "unduly" infringed the "protected freedom" and inflicted "sheer oppression". The maximum penalty against a corporation for criminal libel is fixed by Georgia law at a fine of $1,000. Ga. Code Ann. §§ 26-2101, 27-2506. That legislative judgment as to the penalty necessary to protect the community provides, in our submission, the perspective for appraising the constitutional validity of this award.

This jury verdict, therefore, even more than that in *New York Times*, supplies what Mr. Justice Black, concurring in that judgment, called "dramatic proof . . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs . . ." (376 U. S. at 294). The only way that threat can be removed, short of according the absolute privilege this Court declined in *Times* to find embodied in the First Amendment, is to hold that a jury's compensatory verdict must bear a reasonable relationship to the amount of damage shown and that a permissible punitive additional award must be shaped by such objective factors as the fine imposable upon conviction of criminal libel, the reasonable costs of conducting the litigation (*Day v. Woodward*, 13 How. at 371; see also *Afro-American Publishing Co. v. Jaffe*, 366 F. 2d 649, 661-663 [D. C. Cir. 1966]) or, at most, a modest multiple of the actual damages sustained. The punitive verdict here did not comport with these or any other rational criteria and thus was tainted by a violation of the Constitution.

Second: If the verdict was, as we submit, unconstitutional, it was not saved by the remittitur required by the District Court. For even though the use of a remittitur may be too well established to be "reconsidered or disturbed at this late day," as this Court reluctantly declared in *Dimick v. Schiedt*, 293 U. S. 474, 485 (1935), it is no less established that a verdict based upon a jury's prejudice cannot be cured. *Minneapolis, St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 521 (1931); *National Surety Co. v. Jean*, 61 F. 2d 197, 198 (6th Cir. 1932); *Brabham v. Mississippi*, 96 F. 2d 210 (5th Cir. 1938); *Ford Motor Co. v. Mahone*, 205 F. 2d 267 (4th Cir. 1953). A verdict violative of the Constitution surely is no less incurably defective, if, indeed, the jury's prejudice is not in such a case to be presumed.

The vice of such a verdict is shown plainly in this case. For when the trial court found the jury's verdict to be "grossly excessive", it did not ask itself what size verdict

might comport with constitutional requirements and show a due regard for the importance of preserving freedom of the press. It asked, instead, what was the largest verdict "ever sustained for punitive damages by the Appellate Courts" and, finding that figure to be $175,000 (of which $100,000 was the largest sum awarded against any one defendant) in *Reynolds v. Pegler*, 223 F. 2d 429 (2d Cir. 1955), it expressed its "considered opinion that the maximum sum" that "should have been awarded . . . should be $400,000" (R. 74-76; 225 F. Supp. at 919-920). That the magnitude of the invalid jury verdict exerted a substantial influence upon the Court's determination is, therefore, undeniable. The Court's award was inescapably a "fruit" of the illegal action of the jury. *Cf., e.g., Wong Sun v. United States*, 371 U. S. 471, 484 (1963).

Third: Even if the judgment must be tested by the District Court's award, without regard to the invalid verdict of the jury, we contend that the punishment imposed is repugnant to the Constitution.

In assessing the sum of $400,000 as "the maximum" that "should have been awarded," the Court, as we have said, employed no standard other than its search for the highest punitive award that an appellate court had thus far sustained and, finding that statistic, more than doubled the top figure that it found. It neither sought nor used any objective standard of the kind we think essential when a punishment of this kind is imposed. Deeming the publication unprotected by the First Amendment, it, of course, took no account of the effect of the award, and of the threat of like awards in other cases, on the freedom the Amendment guarantees. The assessment was, therefore, entirely arbitrary and unprincipled. We submit that it offends the Constitution on this ground.

The offense is compounded by the size of the award. What this Court said of the $500,000 judgment rendered against *The New York Times* is no less applicable here:

"Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive" (376 U. S. at 278).

CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed.

HERBERT WECHSLER,
PHILIP H. STRUBING,
Attorneys for Petitioner, Curtis Publishing Company.

PEPPER, HAMILTON & SCHEETZ,
KILPATRICK, CODY, ROGERS,
McCLATCHEY & REGENSTEIN,
Of Counsel.